CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 650

L. W. BALDWIN AND GUY A. THOMPSON, AS TRUSTEES OF MISSOURI PACIFIC RAILROAD COMPANY, PETITIONERS,

vs.

SCOTT COUNTY MILLING COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED FEBRUARY 6, 1939.

CERTIORARI GRANTED MARCH 13, 1939.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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[fol. a] [Captions omitted]

[fol. b] **IN CIRCUIT COURT OF SCOTT COUNTY**

No. 5203

L. W. Baldwin and Guy A. Thompson, as Trustees of the Missouri Pacific Railroad Company, a Corporation, Plaintiffs,

vs.

Scott County Milling Company, a Corporation, Defendant

Action for Money Had and Received

Judgment—March 20, 1936

Now, again on this day, come the parties herein by their respective attorneys, and this cause having heretofore been submitted to the Court and by the Court taken under advisement, and the Court now being sufficiently advised of and concerning the premises does find the issues herein in favor of the Defendant and against the Plaintiffs, and the Court does find the Plaintiffs should take nothing by reason of this action.

It is, therefore, Considered, Ordered and Adjudged by the Court, That said Plaintiffs, L. W. Baldwin and Guy A. Thompson, Trustees of the Missouri Pacific Railroad Company, a corporation, take nothing from the said Defendant, Scott County Milling Company, a corporation, and that the said Defendant have and recover of and from the said Plaintiffs its costs and charges in this cause paid out and expended and have therefor execution.

[fol. c] [File endorsement omitted]

In Circuit Court of Scott County

[Title omitted]

Motion for New Trial—Filed March 21, 1936

Now at this time comes L. W. Baldwin and Guy A. Thompson, as Trustees of the Missouri Pacific Railroad Company,

a corporation, and move the court to set aside its verdict, findings and judgment in the above entitled cause and grant them a new trial therein, for the following reasons:

1) The verdict, findings and judgment of the court is against the evidence, against the weight of the evidence and against the law under the evidence.

2) The verdict, findings and judgment of the court was for the wrong party.

3) The court erred in admitting incompetent, irrelevant and immaterial evidence offered on behalf of defendant.

4) The court erred in rejecting competent, relevant and material evidence offered on behalf of plaintiffs.

5) The court erred in giving instruction No. 2, requested by plaintiffs with the following notations:

"Given, but not involved in the case."
"Not considered in the case, but is ok."

6) The court erred in refusing instruction No. 3, requested by plaintiffs. The court made the following notation on said instruction:

[fol. d] "Merely academic not involved in the case and not necessary to pass on it."
"Never considered."

7) The court erred in giving instruction No. 5, requested by plaintiff, with the following notations:

"Given but not a factor in the case."

8) The court erred in refusing instruction No. 7, requested by plaintiffs.

9) The court erred in giving instruction No. 8, requested by plaintiffs with the following notation:

"Given, but not involved in the case."

10) The court erred in giving instructions numbered 1-A, A, B, F and I requested by defendant.

11) Under the law and the facts in this case, the findings and judgment of the court should have been for plaintiffs, and the court erred in refusing to make such findings and entered such judgment.

8. The opinion of the court discloses on its face that the court misconceived the facts and law in the case, and that it erred in its findings and judgment for defendants.

Wherefore, plaintiffs pray the court to sustain their motion for new trial.

H. H. Lorimore, Dearmont, Spradling & Dalton, Attorneys for Plaintiffs.

Filed Mar. 21, 1936. L. J. Pfefferkorn, Circuit Clerk.

[fol. e] IN CIRCUIT COURT OF SCOTT COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR A NEW TRIAL—April 8, 1936

Now, on this day, come the parties herein by their respective Attorneys, and in open Court the Motion for a New Trial filed by Plaintiffs in this cause on the 21st day of March, 1936, is now taken up and submitted to the Court and the Court here being now sufficiently advised of and concerning the premises and having duly considered said [fol. f] Motion does overrule the Plaintiff's Motion for a New Trial in this cause, to which ruling of the Court, the Plaintiff's by their Counsel object and except.

It is, Therefore, the Order of the Court, That the Plaintiff's Motion for a New Trial, filed herein as aforesaid, be, and the same is hereby overruled.

IN CIRCUIT COURT OF SCOTT COUNTY

[Title omitted]

APPLICATION AND AFFIDAVIT FOR APPEAL—Filed April 8, 1936

Now at this time comes Guy A. Thompson and L. W. Baldwin, Trustees of the Missouri Pacific Railroad Company, the plaintiffs in the above entitled cause, and pray the court to grant them an appeal from the verdict and judgment rendered in this cause to the Supreme Court of the State of Missouri, and herewith deposit the sum of $10.00,

the docket fee required by law to be deposited on making application for an appeal.

In support of this application for an appeal, A. M. Spradling, for and on behalf of the plaintiffs, makes oath and says that he is the agent and attorney for plaintiffs and that [fol. g] this application for an appeal is not made for vexation or delay, but because affiant believes that the appellants (who are the plaintiffs in this cause) are aggrieved by the judgment and decision of this court.

A. M. Spradling.

Subscribed and sworn to before me, this 8th day of April, 1936. L. J. Pfefferkorn, Circuit Clerk. (Seal.)

Filed Apr. 8th, 1936. L. J. Pfefferkorn, Circuit Clerk.

In Circuit Court of Scott County

[Title omitted]

Order Granting Appeal—April 8, 1936

Now, on this day, again come the Plaintiffs herein by their Attorneys, Dearmont, Spradling & Dalton (A. M. Spradling) and file their Affidavit for an Appeal in this cause and pay to the Clerk of this Court the sum of Ten and No/100 Dollars ($10.00), the Appeal Docket Fee required by law.

Which said Affidavit for an Appeal is now taken up and submitted to the Court and by the Court found sufficient and sustained.

[fol. h] It is, Therefore, the Order of the Court, That the Plaintiffs herein be, and they are hereby granted an Appeal in this cause to the Supreme Court of the State of Missouri, and that said Plaintiff's be and are hereby granted time in which to file their Bill of Exceptions in this cause.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 1] IN SUPREME COURT OF MISSOURI, DIVISION No. 1, SEPTEMBER TERM, 1937 (JANUARY CALL, 1938)

No. 35,278

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of the Missouri Pacific Railroad Company, a Corporation, Plaintiffs-Appellants,

vs.

SCOTT COUNTY MILLING COMPANY, a Corporation, Defendant-Respondent

Appeal from the Circuit Court of Scott County, Missouri, Honorable Frank Kelly, Judge

Appellants' Abstract of the Record—Filed December 14, 1937

This action was instituted on the 29th day of March, 1935, by the filing of plaintiffs' petition in the Circuit Court of Scott County. Summons was issued returnable to the August Term, 1935, of said court, and duly served on defendant.

[fol. 2] The petition (caption and signatures omitted) was as follows:

PETITION

—

Plaintiff for their cause of action state that the Missouri Pacific Railroad Company, is now and was at all times hereinafter mentioned a corporation duly organized and existing under the laws of the State of Missouri; that said corporation for many years has owned and operated lines of railroad running and extending through the State of Missouri and other states; that on or about the 31st day of March, 1933, said corporation filed its petition in the United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri, under Section 77 (a), Chapter 8 of the Acts of Congress relating to bankruptcy; that thereafter upon said date said District Court entered an order approving the filing of said petition; that thereafter the plaintiff, L. W. Baldwin and Guy A. Thompson, were by said Court duly appointed Trustees for said

Railroad Company; that thereafter the said L. W. Baldwin and Guy A. Thompson duly qualified as such Trustees and are now the duly appointed, qualified and acting Trustees of said Missouri Pacific Railroad Company; that as such Trustees in Bankruptcy they have been since their appointment and are now in control and possession of the properties of said corporation and have been and are now operating and conducting its business as such Trustees; that as Trustees they are duly authorized and entitled to bring this action.

[fol. 3] II

Plaintiffs further allege and aver that the defendant, Scott County Milling Company, is now and was at all times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, with its principal business office in the City of Sikeston, Scott County, Missouri.

III

Plaintiffs further allege and aver that at the times mentioned in this petition the Missouri Pacific Railroad Company, a corporation, was a common carrier, engaged in interstate commerce and that among other things it received, transported and delivered freight for hire and received freight from other and connecting lines for transportation and delivery; that as part of its business it received, transported and delivered as sole carrier and also received from connecting railroad lines for transportation and delivery, bituminous coal from points in Southern Illinois and Western Kentucky, to be carried and delivered to the defendant at Sikeston, Missouri, and other points by it designated in Southeastern Missouri; that it was entitled to and did charge defendant the regular, proper and established rate therefor, for itself and connecting lines from whom it received a part of said freight, and that in such transaction it refunded to the defendant large sums of money not due to the defendant and which sums of money the defendant still holds and retains and is due to repay to these plaintiffs as and for money had and received in the sum of twenty-three thousand nine hundred ninety-four dol-
[fol. 4] lars and thirty-three cents ($23,994.33), which said

sum was, by said Missouri Pacific Railroad Company, paid to the defendant on various dates between March 3, 1929, and April 23, 1929, under, by virtue and authority and because of certain orders of the Interstate Commerce Commission of the United States, which said orders were thereafter, to wit, on July 3, 1933, vacated, set aside and revoked; that by reason thereof the said defendant is entitled to repay to plaintiffs herein said sum of money; that plaintiffs did on October 30, 1934, in writing, demand said payment of and from defendant, which said demand was refused; and that by reason of said facts, plaintiffs are entitled to recover said sum, herein, from defendant for money had and received, by reason of the facts hereinbefore and hereinafter stated.

IV

Plaintiffs further state that on or about the 15th day of September, 1924, defendant filed a complaint with the Interstate Commerce Commission of the United States, alleging that the rates charged by the Missouri Pacific Railroad Company and other railroads named as defendants in said action, on bituminous coal from points in Southern Illinois and Western Kentucky to points in Southeastern Missouri and Northeastern Arkansas were unreasonable. Said complaint was styled Scott County Milling Company et al. v. Butler County Railroad Company et al., and was docketed as No. 16,323 by the Secretary of the Interstate Commerce Commission; that thereafter, on the 25th day of January, 1926, said complaint was submitted to the Interstate Com- [fol. 5] merce Commission which on July 12, 1926, through Division No. 1 of said Commission, found for the complainants therein, that the rates assailed from Southern Illinois mines and West Kentucky mines were, are, and for the future would be, unreasonable to the extent that they exceeded certain rates in said finding and order set forth and further finding that said complainants were entitled to reparation with interest; that on the same date an order was entered by Division No. 1 of said Commission in conformity with the findings which order was to continue in force until the further order of the Commission.

V

Plaintiffs further state that thereafter the Missouri Pacific Railroad Company and other defendants filed a motion

for rehearing of said matter before the Interstate Commerce Commission of the United States which on October 5, 1926, reopened said proceedings for further hearing; that said matter was again submitted to the Commission on October 14, 1927, and that on July 10, 1928, said Commission made its finding and entered its order therein; that by said order the Commission vacated and set aside its order of July 12, 1926, and further directed the defendants to establish certain rates on coal as fixed by the terms of said order and ordered reparation for the difference between the rate fixed by said order and those theretofore charged and further ordered that said order should continue in force until the further order of the Commission.

[fol. 6]

VI

Plaintiffs further aver that on the 11th day of February, 1929, and on the 11th day of March, 1929, an order and a supplemental order respectively, were made by the Interstate Commerce Commission of the United States in case No. 16,323, and companion cases in which the Commission found that complainants, including the defendant herein, were entitled to awards of reparation from the defendants therein, among whom was included the Missouri Pacific Railroad Company, in the amounts specifically set out in the findings of the Commission and ordering the defendants in said cause, including the Missouri Pacific Railroad Company, to pay unto the complainants in said cause, among whom was the defendant herein, the amount of the reparation therein found to be due and that said payment be made on or before March 28, 1929, on the reparation covered by the order of February 11, 1929, and that payments be made by April 26, 1929, on the reparation covered by the supplemental order of March 11, 1929.

VII.

That because of and on account of the said orders of the Interstate Commerce Commission of the United States made on the said 11th day of February, 1929, and the 11th day of March, 1929, ordering and directing the said Missouri Pacific Railroad Company to pay to the defendant herein, Scott County Milling Company, on or before March 28, 1929, and on or before April 28, 1929, respectively, the

said reparation awards found by said United States Inter-
[fol. 7] state Commerce Commission to be due said defendant; and because, and on account of the said Interstate Commerce Commission of the United States having jurisdiction of said cause and legal authority to make such reparation award and to enforce the same, and because said Missouri Pacific Railroad Company had no appeal therefrom; said Missouri Pacific Railroad Company having no alternative, was required to and did pay to said defendant herein in full the various amounts of said reparation award so determined and fixed by the said Interstate Commerce Commission, together with six per cent (6%) interest thereon, in the total sum of twenty-three thousand nine hundred and ninety-four dollars and thirty-three cents ($23,994.33); and which said amount it paid to the defendant, Scott County Milling Company, on various dates between March 3, 1929, and April 23, 1929, inclusive, and which sum and amount the said defendant, Scott County Milling Company, demanded and received and still retains.

VIII

Plaintiffs further state that thereafter, on June 3, 1931, the Missouri Pacific Railroad Company and other railroad companies named as defendants in said case No. 16,323 before the Interstate Commerce Commission of the United States and companion cases thereto, filed a supplemental petition asking for the reopening, consolidation and argument of said case No. 16,323 and companion cases; that at the time the said supplemental petition was filed said Interstate Commerce Commission of the United States had jurisdiction of said case No. 16,323 and companion cases and
[fol. 8] full authority to act therein and to make orders and enter judgments therein and to set aside, vacate, annul and invalidate any previous orders that had been made therein; that on the 2nd day of November, 1931, said Interstate Commerce Commission granted the prayer of said supplemental petition and entered an order duly reopening said case No. 16,323 and companion cases for further hearings; that thereafter said further hearings in said cases were held and on July 3, 1933, said Interstate Commerce Commission made its findings and entered its orders setting aside, vacating, annuling and invalidating the orders theretofore entered in case No. 16,323 and companion cases, in-

cluding the orders of July 12, 1926, July 10, 1928, and all other orders and judgments hereinbefore set out and mentioned, whereby the reparation award was made in favor of the defendant, Scott County Milling Company, against the Missouri Pacific Railroad Company and other railroads, parties defendant therein.

IX

Plaintiffs further state and aver that by virtue of the order of the Interstate Commerce Commission of the United States made on July 3, 1933, whereby the reparation awards herein referred to, and the order directing that same be paid were set aside, invalidated and vacated, the said reparation awards became null and void from the beginning and of no force and effect, and no legal or binding bases, authority or right by which the defendant herein received and retained the sums of money paid to it under said reparation awards by the Missouri Pacific Railroad [fol. 9] Company; that under and by reason of said order of the Interstate Commerce Commission of July 3, 1933, as aforesaid, the said payment by the Missouri Pacific Railroad Company to the defendant, Scott County Milling Company on various dates between March 3, 1929, and April 23, 1929, inclusive, in the total sum of twenty-three thousand nine hundred ninety-four dollars and thirty-three cents ($23,994.33), was erroneous and wrong, and that said defendant is not entitled to retain and hold said money but that the same is due to the plaintiffs herein, together with six per cent (6%) interest thereon from the date of payment to the defendant; that said defendant has and retained said money without right or title thereto and against the demands in writing made by plaintiff to defendant for payment thereof to them, on the 30th day of October, 1934.

X

Wherefore, the premises considered plaintiffs pray judgment against the defendant for the said sum of twenty-three thousand nine hundred ninety-four dollars and thirty-three cents ($23,994.33), together with six per cent (6%) interest thereon from the date of payment, to wit, April 23, 1929, and for its costs in this behalf expended.

The answer of defendant to plaintiffs' petition was filed August 12, 1935, and thereafter on September 5, 1935, an amended answer was filed, which said amended answer (omitting caption and signatures) is in words and figures as follows:

[fol. 10] AMENDED ANSWER

Now, at this time comes defendant and, leave of Court first had and obtained, files this its first amended answer to plaintiffs' petition and admits that it is a corporation, as alleged in plaintiffs' petition; admits the corporate existence of the Missouri Pacific Railroad Company and admits that L. W. Baldwin and Guy A. Thompson are Trustees in Bankruptcy of said railroad, as alleged in said petition.

Defendant admits that the Missouri Pacific Railroad Company was a common carrier and engaged in interstate commerce and received, discharged and transported freight for hire and received freight from other and connecting lines for transportation and delivery, and admits that it received from connecting carriers coal from the coal fields of Southern Illinois and Western Kentucky, to be shipped and transported and delivered to defendant at Sikeston and other places by it designated in Scott County, Missouri; admits that in September, 1925, this defendant and others filed a complaint with the Interstate Commerce Commission of the United States against the Butler County Railroad and others, incluring the Missouri Pacific Railroad Company, alleging the unreasonableness of rates on bituminous coal from various points in Southern Illinois and Western Kentucky to destinations in Southeast Missouri, and admits that the Interstate Commerce Commission found the rates of the Missouri Pacific Railroad Company and connecting lines to be unreasonable, and admits that said Commission made a finding that this defendant was entitled to reparations [fol. 11] because of the unreasonable charges theretofore made on shipments of coal to defendant from various points in Southern Illinois and Western Kentucky to destinations in Southeast Missouri, but avers that said finding that this defendant was entitled to reparation was not alone against the Missouri Pacific Railroad Company, but against the Missouri Pacific Railroad Company and connecting carriers over whose lines said shipments originated, and avers that the payment of twenty-three thousand nine hundred ninety-

four and 33/100 ($23,994.33) dollars made on various dates between March 23, 1929, and April 23, 1929, represented the total amount of reparations plus interest found to be due from the Missouri Pacific Railroad Company and connecting carriers, and denies each and every other allegation in said petition contained and, having fully answered, prays to be discharged with its costs.

For further answer to plaintiff's petition defendant says that whatever sums of money were paid to it by the Missouri Pacific Railroad Company were paid between March 23, 1929, and April 23, 1929, and that if the plaintiff has a cause of action it accrued at the date of said payments and that said cause of action accrued more than five (5) years prior to the date of the institution of this action, and that plaintiffs' alleged cause of action is barred by the Five-year Statute of Limitations.

For further answer to plaintiff's petition defendant alleges that on the filing by this defendant of its complaint to the Interstate Commerce Commission as to the coal rates exacted and charged by the Missouri Pacific Railroad Company and connecting lines on bituminous coal from Southern [fol. 12] Illinois and Western Kentucky fields, the Missouri Pacific Railroad Company and other carriers against whom said complaint was filed contested said matter for a long period of time before the Interstate Commerce Commission, and that both the complainant and the railroad lines offered evidence, were heard in argument and, after full and complete hearings, the Interstate Commerce Commission made a finding that this defendant was entitled to reparation as follows:

From the Missouri Pacific Railroad Company	$14,242.93
Illinois Central and Missouri Pacific Railroad Company	5,618.68
C. C. C. & St. L. and Missouri Pacific Railroad Company	187.34
Wabash, Chester and Western and Missouri Pacific Railroad Company	70.20
Mobile and Ohio and Missouri Pacific Railroad Company	23.42

and that defendant was entitled to interest on the portion of the freight they had paid in excess of a reasonable rate, so that the total amount due this defendant from the Missouri

Pacific Railroad Company and the connecting carriers was twenty-three thousand nine hundred ninety-four and 33/100 ($23,994.33) dollars; that after the Interstate Commerce Commission had determined that this defendant was entitled to reparation, but before determining the amount thereof, a statement under Rule V of the Commission's Rules of Practice, showing in detail each shipment of coal, the amount of charges paid, the date when paid, the amount the [fol. 13] charges should have been had the rate been reasonable as found by the Commission, and the amount of reparation on each shipment under the Commission's decision, was filed with the Commission after having been certified by the Missouri Pacific Railroad Company as the collecting carrier, and at said time in said certificate the said Missouri Pacific Railroad Company expressly reserved all its legal rights to contest and resist the payment of any award of reparation which might be based upon the Rule V statement which they certified, and expressly recited that in certifying to the Rule V statement they did not admit liability in any way or to any extent or for any purpose, and this defendant further avers that the order of the Interstate Commerce Commission for the payment of reparation was not self-enforcing and that the Interstate Commerce Commission was without power or authority to issue execution or other process for the purpose of enforcing said order, and avers that the said Missouri Pacific Railroad Compan, and connecting carriers could either voluntarily acquiesce in the order of the Interstate Commerce Commission and pay said reparation or refuse to make such payment, in which event this defendant would have been required to bring suit in the United States District Court or any state court of general jurisdiction for the recovery of damages, and in said action the railroad company could contest the right of defendant to recover thereon, and the only force and effect of the finding of the Interstate Commerce Commission was that if suit was brought in the United States District Court it would be admissible on the trial of said cause as prima facie evidence of the unreasonableness of the freight charges exacted from [fol. 14] this defendant and prima facie evidence of the amount of defendant's damage, but defendant avers that after said award was made the said Missouri Pacific Railroad Company and connecting lines, with knowledge of all the facts and without duress or any fraud having been prac-

ticed by this defendant, voluntarily elected to pay said reparation and, having voluntarily elected to and paid the same, cannot recover the same back in this action.

For another and further answer to plaintiffs' petition defendant says that it had engaged and employed a traffic expert to represent it before the Interstate Commerce Commission in the matter of its claim for reparation and contracted and agreed to pay said representative a contingent fee of fifty (50%) per cent of whatever sum was collected by way of reparation, and defendant says that when the said Missouri Pacific Railroad Company and connecting lines elected to pay reparation found to be due this defendant, and believing that said matter was finally concluded and determined, this defendant was obligated to and did pay its representative fifty (50%) per cent of the said sum of twenty-three thousand nine hundred ninety-four and 33/100 ($23,994.33) dollars, and that the said Missouri Pacific Railroad Company, its Trustees and connecting lines took no action and made no demand for the recovery of the reparation so paid until more than five (5) years after this defendant had paid its representative fifty (50%) per cent of the sum so recovered, so that the Five-year Statute of Limitations is a complete bar to defendant's recovery of any portion of the sum it paid its representative for services before the Inter- [fol. 15] state Commerce Commission, and defendant further avers that it distributed the balance of said fund by way of dividends to its stockholders and used the same for general corporate purposes; that the said Missouri Pacific Railroad Company and its Trustees stood by for almost six (6) years without making any claim or demand for the return of same or without contending in any manner whatsoever that this defendant was liable for the sum which the Missouri Pacific Railroad Company and connecting carriers had paid as reparations; that in a petition filed by the Missouri Pacific Railroad Company before the Interstate Commerce Commission, dated May 15, 1931, the said railroad company alleged:

"The Scott County Milling case, supra, involves future rates and reparation. The reparation has been paid, the rates prescribed made effective and the case is asked to be reopened for the purpose of having the Commission prescribe for the future a different and higher basis of rates."

And so defendant avers that in its petition before the Interstate Commerce Commission said Missouri Pacific Railroad Company ratified and confirmed its voluntary act in paying its portion of the reparation found to be due this defendant and by its said pleading voluntarily waived any claim for recapture thereof and expressly limited said petition to the matter of prescribing for the future a different and higher basis of rates on bituminous coal; that after the Interstate Commerce Commission set aside its order reducing the rates on bituminous coal from Southern Illinois and Western Kentucky fields to Sikeston and other points in Southeast Missouri from two and 13/100 ($2.13) dollars a ton to one and 63/100 ($1.63) dollars a ton, the Missouri [fol. 16] Pacific Railroad Company and connecting carriers voluntarily filed a rate of one and 75/100 ($1.75) dollars a ton, thereby admitting and confessing that its previous rate of two and 13/100 ($2.13) dollars a ton was unreasonable; that while the payment of reparation to this defendant was made by the check of the Missouri Pacific Railroad Company said company in turn collected from connecting carriers over whose lines said shipments originated, a large portion of the amount paid, the amount of which defendant is unable to state, but avers and alleges that the Missouri Pacific Railroad Company and its Trustees were reimbursed by the Illinois Central, C. C. C. and St. L. Railroad, Wabash, Chester and Western Railroad and the Mobile and Ohio Railroad for a large portion of the sum they seek to recover in this action; that said connecting carriers voluntarily reimbursed the Missouri Pacific Railroad Company for their portion of the reparations ordered to be paid, and that all of said connecting carriers fully, finally and completely acquiesced in the order of the Interstate Commerce Commission and elected to voluntarily make said payments and never at any time filed before the Interstate Commerce Commission any petition asking for the reopening of said matter nor at any time made any claim or contention that this defendant should return their portion of the reparation so paid; that immediately upon the finding of the Interstate Commerce Commission that defendant had been damaged by the charging of excessive and unreasonable rates on coal delivered to it by the Missouri Pacific Railroad Company and connecting lines and upon the ordering of reparation, the defendant [fol. 17] was given a cause of action against the said Mis-

souri Pacific Railroad Company and connecting lines for the recovery of its damage for such unreasonable charges, and that if the said Missouri Pacific Railroad Company and connecting lines had not paid said reparation this defendant could and would have instituted an action for the recovery of its damages, and that after filing suit therefor the Court before whom said action was pending would have had full and complete jurisdiction in the matter, and any order thereafter made, or attempted to be made, by the Interstate Commerce Commission relative thereto would have been ineffective in so far as recovery of said damages is concerned; that the said Missouri Pacific Railroad Company, having voluntarily paid said reparation, prevented this defendant from instituting suit to recover its damages on that behalf by having thus voluntarily made said payment and thereby prevented defendant from bringing suit and having determined by the courts the unreasonableness of said rates and the amount of its damages, and said railroad company is now estopped from claiming that said reparation was wrongfully paid or that it is entitled to the recapture thereof; that after the order of the Interstate Commerce Commission had been entered finding coal rates unreasonable and that this defendant had been damaged, defendant was given a cause of action against the Missouri Pacific Railroad Company and connecting lines, which it was required, under the Interstate Commerce Act, to institute in some court of competent jurisdiction within two years thereafter; that the said Missouri Pacific Railroad Company and connecting lines [fol. 18] paid said reparation without suit having been brought thereon and made no demand for the return of said money until more than two (2) years after the entering of the order by the Interstate Commerce Commission and waited until the Statute of Limitations contained in the Interstate Commerce Act for the recovery of overcharges had run against this defendant and waited until the Statute of Limitations was a complete bar to defendant's cause of action against the said Missouri Pacific Railroad Company and connecting lines for said overcharges; and that by reason of all of the foregoing facts the retention of the reparations so paid to the defendant will not give offense to equity and good conscience; that in view of all the foregoing facts alleged in this paragraph and the conduct of the Missouri Pacific Railroad Company and its Trustees, plaintiffs are estopped from recovering the reparations so paid and

that equitably this defendant should not restore to plaintiffs any portion of the reparations so received by it.

For another and further answer to plaintiffs' petition defendant avers that under and by virtue of the provisions of Section 16 (a) of the Interstate Commerce Act the Interstate Commerce Commission was authorized, empowered and directed to make general rules regarding applications for rehearing, and said section provided that applications for rehearing shall be governed by such general rules as the Commission may establish, and avers that under and by virtue of the authority thus granted by the Act of Congress the Interstate Commerce Commission did adopt and establish rules governing applications for rehearing and that at the time of the entering of the order finding that defendant was [fol. 19] entitled to reparation from the Missouri Pacific Railroad Company and connecting lines there was in force and effect a rule theretofore adopted by the Interstate Commerce Commission and known as Rule XV (e) of the Interstate Commerce Commission's Rules of Practice, which said rule is as follows:

"A petition for rehearing that part of any case relating to reparation must be filed within sixty (60) days after service of a report therein;"

and this defendant avers that upon the entering of the order of reparation service of report of said Commission was had upon the Missouri Pacific Railroad Company and connecting lines, and that the said carriers filed a motion for rehearing on April 25, 1929, and that said motion for rehearing was denied by order of the Commission on June 10, 1929, and that said motion was the only motion filed within sixty (60) days after service of the report of the Commission relating to reparation. Defendant further avers that prior to April 26, 1930, under and by virtue of the authority granted by the Act of Congress the Commission had promulgated and adopted a rule known as XV (f) of the Interstate Commerce Commission's Rules of Practice, which said rule provides:

"A second application under paragraph (a) of this rule for a rehearing, reargument, reconsideration or for the vacation of any order by the same party or parties and upon the same ground as a former petition or application which has been considered and denied, will not be entertained;"

[fol. 20] and defendant avers that a petition for rehearing filed by the Missouri Pacific Railroad Company on September 7, 1929, was overruled by the Commission on October 14, 1929, and that the Missouri Pacific Railroad Company and other carriers filed a motion for modification of the order entered by the Commission, which petition was dated October 17, 1929, and which was denied by the Commission's entering an order dated November 11, 1929, and that on April 26, 1930, the Missouri Pacific Railroad Company and other carriers filed a petition for reopening and consolidation of case number 16,323, and other cases, with a general investigation, which said motion was denied by the Commission in an order entered June 30, 1930, and that thereafter supplemental petition for reopening, consolidation and reargument, or in the alternative, a reopening and consolidation of said case number 16,323 and other cases, with a general investigation of coal rates, dated May 15, 1931, was filed June 3, 1931, and this defendant avers that said petition was filed by the same parties on the same grounds as former petitions and applications had been made and denied and was not filed within sixty (60) days after the service of the report of the order of reparation, and that under and by virtue of the rules adopted by the Interstate Commerce Commission it had no power or authority to entertain a petition for rehearing said cause relative to the reparations allowed the Scott County Milling Company, because said petition was not filed within sixty (60) days after service of a report therein and because the petition dated May 15, 1931, and filed June 3, 1931, was filed by the Missouri Pacific Railroad Company upon the same grounds as [fol. 21] former petitions and applications had been filed, which had been considered and denied and which was not the first application but was a second, third or fourth application for rehearing, reargument and reconsideration and a vacation of the orders complained of, and defendant says that under and by virtue of the rules of the Commission the order granting reparation to this defendant had become final and could not thereafter be reopened for further determination; that the Interstate Commerce Commission had no power or authority to set aside its previous order awarding reparation to this defendant on a petition filed more than sixty (60) days after the order of reparation had been served on the Missouri Pacific Railroad Company and connecting lines; that under the Rules of Practice of said Com-

mission said order had become final, in so far as said Commission was concerned, long prior to the date of the filing of plaintiffs' petition on June 3, 1931, and that on said date the Interstate Commerce Commission was without power and authority to enter an order retroactive in effect so as to affect the private rights of this defendant, and this defendant denies that the Interstate Commerce Commission made any order with respect to the right of these plaintiffs to recover reparations paid under the previous order of the Commission.

For another and further answer to plaintiffs' petition, this defendant says that under and by virtue of Section 16, Chapter 1, of the Interstate Commerce Act of the United States, found in Title 49, U. S. C. A., it is provided:

"All actions at law by carriers subject to this chapter for [fol. 22] recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues and not thereafter;"

and defendant avers that plaintiffs' cause of action is barred by said provision of the statutes of the United States passed with reference to interstate commerce in this, that plaintiff seeks to recover a portion of its alleged charges for carrying freight, and that under the Act of Congress its cause of action accrued at the time of the delivery of said freight; that all of the coal on which reparation was paid was delivered more than three (3) years prior to the beginning of this action; that plaintiff's cause of action accrued, if at all, more than three (3) years prior to the filing of this suit and is, therefore, barred by said section of the Commerce Act of the United States. For another and further answer to plaintiffs' petition, defendant says that Section 16, Chapter 1, of the Interstate Commerce Act of the United States, found in Title 49, U. S. C. A., provides:

"A petition for the enforcement of an order by the Commission for the payment of money shall be filed in the District Court or the state court within a year from the date of the order, and not thereafter;"

and defendant avers that plaintiff seeks to recover in this action on the theory that the order of the Interstate Commerce Commission on July 3, 1933, setting, or attempting to set aside, its previous orders, was in effect an order to this

defendant for the payment of money, that is, for the repay-
[fol. 23] ment of the reparation theretofore awarded and paid, and defendant says that this suit against this defendant for the payment of the reparation theretofore made was not begun within one (1) year from the date of the order of the Interstate Commerce Commission and is, therefore, barred by said Act of Congress.

Wherefore, having fully answered, defendant prays to be discharged with its costs.

Thereafter said cause was continued by the Court from term to term unto the March Term, 1936.

TRIAL

Thereafter, to wit, on the 16th day of March, 1936, this cause came on for trial at and during the regular March Term, 1936, of the Circuit Court of Scott County, Missouri, before the Honorable Frank Kelly, the regular Judge, a jury being waived; the cause was taken up and submitted to the Court upon the pleading and evidence presented, and the Court, after hearing all of the evidence and the argument of counsel, took said cause under advisement until the 20th day of March, 1936, being the regular March Term, 1936, of said court, when judgment was entered as follows (caption omitted), to wit:

JUDGMENT

Now, again on this day, come the parties herein, by their respective attorneys, and this cause having heretofore been submitted to the Court and by the Court taken under advisement, and the Court now being sufficiently advised of and concerning the premises, does find the issues herein in
[fol. 24] favor of the defendant and against the plaintiffs, and the Court does find the plaintiffs should take nothing by reason of this action.

It Is, Therefore, Considered, Ordered and Adjudged by the Court, That said plaintiffs L. W. Baldwin and Guy A. Thompson, Trustees of the Missouri Pacific Railroad Company, a corporation, take nothing from the said defendant, Scott County Milling Company, a corporation, and that the said defendant have and recover of and from the said plain-

tiffs its costs and charges in this cause paid out and expended and have therefore execution.

Thereafter, on March 21, 1936, and at the same term of said court and within four days after the rendition of said judgment by the Court, the plaintiffs filed their motion for a new trial and record entry was duly made of such filing.

ORDER OVERRULING MOTION FOR NEW TRIAL

Thereafter, on the 8th day of April, 1936, and at the same term of said court, the said motion for a new trial was taken up and submitted to the Court and the same was, by the Court, overruled, and said order of the Court was duly entered of record at the time.

AFFIDAVIT FOR APPEAL FILED AND APPEAL GRANTED

Thereafter, on the 8th day of April, 1936, and during the March Term, 1936, of said court, the plaintiffs filed their affidavit for appeal in due and statutory form and on the same date all necessary and proper steps were duly and [fol. 25] timely taken to prosecute this appeal to this Court and such appeal was duly taken and all necessary orders therefor duly and timely made and entered of record at said March Term, 1936, of the Circuit Court of Scott County, Missouri.

BILL OF EXCEPTIONS FILED

Appellants' bill of exceptions was thereafter on the 2nd day of December, 1937, and within the time required by law, presented to the Court and duly allowed, signed and sealed by the Court and filed in said cause and record entry thereof duly made at said time. The said bill of exceptions (caption omitted) is in words and figures as follows:

Bill of Exceptions—Filed December 2, 1937

Be It Remembered, That this cause coming on to be heard in the above-entitled court on March 16, 1936, being

the regular March Term, before Honorable Frank Kelly, the regular Judge, the following proceedings were had, to wit:

APPEARANCES

For plaintiffs: Thos. J. Cole, H. H. Larimore, C. M. Spence, Dearmont, Spradling & Dalton.

For defendant: Bailey & Bailey, Finch & Finch.

Filed December 2, 1937. L. J. Pfefferkorn, Circuit Clerk.

[fol. 26] The following evidence was offered on behalf of plaintiffs and defendant:

IN CIRCUIT COURT OF SCOTT COUNTY, MISSOURI, AUGUST TERM, 1935

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of the Missouri Pacific Railroad Company, a Corporation, Plaintiffs,

vs.

SCOTT COUNTY MILLING COMPANY, a Corporation, Defendant

AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by the parties to the above-entitled cause that upon the trial thereof the facts hereinafter set forth will be agreed upon by the parties without formal proof thereof and that said cause will be submitted to the Court, a jury being waived, upon said agreed statement of facts and such additional testimony, if any, as either party may care to offer at the trial.

(1) It is agreed that the Missouri Pacific Railroad Company is now and was at all times hereinafter mentioned a corporation duly organized and existing under the laws of the State of Missouri; that on March 31, 1933, said corporation filed its petition in the United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri, under Section 77 (a), Chapter 8, of [fol. 27] the Acts of Congress relating to bankruptcy; that thereafter upon said date said District Court entered an order approving the filing of said petition; that thereafter the plaintiffs, L. W. Baldwin and Guy A. Thompson, were

by said Court duly appointed Trustees for said railroad company and thereafter duly qualified as such Trustees and are now duly appointed, qualified and acting Trustees of said railroad company; that said Missouri Pacific Railroad Company for many years has owned and operated lines of railroad running and extending through the State of Missouri and other states; that plaintiffs, L. W. Baldwin and Guy A. Thompson, as such trustees in bankruptcy, have been since their appointment, and are now, in control and possession of the properties of said corporation and have been, and are now, operating and conducting its business as such Trustees; that as Trustees they are duly authorized and entitled to bring this action.

(2) It is agreed that the defendant, Scott County Milling Company, is now and was at all times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, with its principal business office in the City of Sikeston, Scott County, Missouri.

(3) It is agreed and admitted that at all times mentioned in plaintiffs' petition the Missouri Pacific Railroad Company, a corporation, was a common carrier engaged in interstate commerce, and that, among other things, it received, transported and delivered freight for hire and received freight from other and connecting lines for transportation and delivery; that as part of its business it received, transported and delivered as sole carrier and also received from [fol. 28] connecting railroad lines for transportation and delivery bituminous coal from points in Southern Illinois and Western Kentucky, to be carried and delivered to the defendant at Sikeston, Missouri, and other points by it designated in Southeastern Missouri; that the rate charged and collected by the Missouri Pacific Railroad Company for the transportation and delivery of said bituminous coal was the rate then duly in effect and provided for by the tariff duly filed with the Interstate Commerce Commission.

(4) It is agreed and admitted that on or about September 15, 1924, the defendant and others filed a complaint with the Interstate Commerce Commission of the United States against the Butler County Railroad Company, and others, including the Missouri Pacific Railroad Company, alleging

that the rate charged by the Missouri Pacific Railroad Company and other railroads named as defendants in said action, on bituminous coal from points in Southern Illinois and Western Kentucky to points in Southeastern Missouri and Northeastern Arkansas, were unreasonable; that said complaint was styled Scott County Milling Company et al. v. Butler County Railroad Company et al., and was docketed as No. 16,323 by the Secretary of the Interstate Commerce Commission; that thereafter, on the 25th day of January, 1926, said complaint was submitted to the Interstate Commerce Commission, which on July 12, 1926, through Division No. 1 of said Commission, found for the complainants therein that the rates assailed from Southern Illinois mines and Western Kentucky mines were, are, and for the future would be, unreasonable to the extent that they exceeded certain rates in said findings and order set forth, and further [fol. 29] finding that said complainants were entitled to reparation with interest; that on the same date an order was entered by Division No. 1 of said Commission in conformity with the findings, which order was to continue in force until the further order of the Commission.

(5) It is further agreed and admitted that the Missouri Pacific Railroad Company and other defendants filed a motion for rehearing of said matters before the Interstate Commerce Commission of the United States and that the Commission on October 5, 1926, reopened said proceedings for further hearing; that said matter was again submitted to the Commission on October 14, 1927, and that on July 10, 1928, said Commission made its finding and entered its order therein; that by said order the Commission vacated and set aside its order of July 12, 1926, and further directed the defendants, including the Missouri Pacific Railroad Company, to establish certain rates on coal as fixed by the terms of said order and ordered reparation for the difference between the rates fixed by said order and those theretofore charged and further ordered that said order should continue in force until the further order of the Commission; that on February 11, 1929, and on March 11, 1929, an order and supplemental order, respectively, were made by the Interstate Commerce Commission of the United States in said case No. 16,323 and companion cases in which the Commission found that the complainants, including the defendant

herein, were entitled to awards of reparation from the defendants therein, including the Missouri Pacific Railroad Company, in the amounts specifically set out in the findings of the Commission as follows, to wit:

[fol. 30]

From the Missouri Pacific Railroad Company	$14,242.93
From the Illinois Central and Missouri Pacific Railroad Company	5,618.68
From the C. C. C. & St. L. and the Missouri Pacific Railroad Company	187.34
From the Wabash, Chester and Western and Missouri Pacific Railroad Company	70.20
From the Mobile and Ohio and Missouri Pacific Railroad Company	23.42
Total	$20,142.57

That on each of the items listed above the Missouri Pacific Railroad Company was the delivering carrier; that by the terms of the supplemental order entered by the Commission on March 11, 1929, in said cause, the Missouri Pacific Railroad Company and connecting lines were directed to pay unto the defendant herein, on or before April 26, 1929, the said sum of twenty thousand one hundred forty-two and 57/100 ($20,142.57) dollars, hereinabove set forth, with interest thereon at the rate of six (6%) per cent per annum from the respective date of payment of the charges covered thereby; that thereafter on various dates between April 4, 1929, and April 19, 1929, inclusive, the said Missouri Pacific Railroad Company did pay to the said Scott County Milling Company, the defendant herein, the total sum of twenty-three thousand nine hundred ninety-four and 33/100 ($23,994.33) dollars, which was the amount of the reparation award ordered by the Interstate Commerce Commission of the United States to be paid by the said Missouri Pacific Railroad Company and connecting lines to the Scott County [fol. 31] Milling Company, including interest at the rate of six (6%) per cent per annum from the date of the payment of the original charges covered by said reparation award; that the dates and amounts of the payments made by the Missouri Pacific Railroad Company to defendant are as follows:

April 4, 1929	$370.39
April 5, 1929	220.45
April 10, 1929	266.39
April 11, 1929	439.55
April 13, 1929	370.40
April 19, 1929	5,746.49
April 19, 1929	10,702.27
April 19, 1929	1,067.46
April 19, 1929	4,810.93
Total	$23,994.33

(6) It is further admitted and agreed that on or about the 25th day of April, 1929, the Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, and St. Louis Southwestern Railway Company, filed a motion for rehearing and for reconsideration of the record as made and for reargument, which said motion was, on June 10, 1929, denied by the Commission; that thereafter, on the 7th day of September, 1929, the Missouri Pacific Railroad Company filed another motion for rehearing and reconsideration of the record as made and for reargument, which was, on the 14th day of October, 1929, by the Commission denied, and that on October 17, 1929, the Missouri Pacific Railroad Company filed a petition for modification of the order, which said petition for modification was denied by the [fol. 32] Commission on November 11, 1929; that on April 26, 1930, petition was filed by said carriers, including the Missouri Pacific Railroad Company, for reopening and consolidation and a general investigation, which said petition was, on the 30th day of June, 1930, denied by the Commission; that on the 3rd day of June, 1931, the Missouri Pacific Railroad Company and other lines, not including, however, the Illinois Central Railroad Company, the C. C. C. and St. L. Railroad Company, the Wabash, Chester and Western Railroad Company and the Mobile and Ohio Railroad Company, filed a supplemental petition for reopening, consolidation and argument or reopening and general investigation of coal rates, and on November 2, 1931, the Interstate Commerce Commission granted the prayer of said supplemental petition and entered an order reopening said case, being case No. 16,323, and companion cases for further hearing; that thereafter said further hearings in said cause were held, and on July 3, 1933, said Interstate

Commerce Commission made its finding and entered its orders, which, among other things, directed that the orders theretofore entered in said cause and companion cases, including the orders of July 12, 1926; July 10, 1928, and all other orders theretofore entered, be set aside, vacated, annulled and invalidated. It is further agreed that in the petition dated July 3, 1931, and filed July 10, 1931, said petition, among other things, said:

"The Scott County Milling Company case, supra, involves future rates and reparation. The reparation has been paid, the rates prescribed made effective and the case [fol. 33] is asked to be reopened for the purpose of having the Commission prescribe for the future a different and higher basis of rates. * * *

"That petitioners and other carriers involved may have the benefit of reasonable rates on coal, and that revenues sorely needed may not be further depleted through payments of reparation awarded on a basis unreasonably low, it is earnestly urged that this petition be granted, and that the Commission, by proper orders in the cases shown in the caption of this petition and shown in Appendix A hereto, reopen, vacate the orders entered therein and consolidate such cases and set down the same for argument before the entire Commission for the purpose of determining the reasonableness of rates for the future and for the past; or, in the alternative, reopen, vacate the orders entered therein and consolidate such cases with a general investigation of coal rates prayed for in petition, dated May 15, 1931, if and when such general investigation is ordered."

(7) It is further admitted and agreed that on the 30th day of October, 1934, the plaintiff, in writing, demanded of defendant the payment of the said sum of twenty-three thousand, nine hundred ninety-four and 33/100 ($23,994.33) dollars theretofore paid to it by the Missouri Pacific Railroad Company; that the defendant, Scott County Milling Company, refused to pay the sum so demanded to the plaintiff herein or any part or portion thereof, and still refuses so to do.

(8) It is further admitted and agreed that after the Interstate Commerce Commission had determined that defendant was entitled to reparation, but before its supple-

mental order of March 11, 1929, setting forth the specific [fol. 34] amount as entered, a statement under Rule V of the Commission's Rules of Practice, showing in detail each shipment of coal, the amount of charges paid and when paid, the amount the charges should have been should the rate have been reasonable as found by the Commission and the amount of reparation on each shipment under the Commission's decision, was filed with the Commission after having been certified by the Missouri Pacific Railroad Company as collecting carrier; that at said time in said certificate the Missouri Pacific Railroad Company stated as follows:

"The foregoing state[illegible]'s have been checked in accordance with the requirem[illegible] of the Commission's Rules of Practice, and solely for the purpose of ascertaining whether the shipments listed were transported over the routes and transportation charges collected on the basis claimed. In making that check and the certification required by the Commission, the carriers do not admit, directly or indirectly, that there should or could legally be any award of reparation based upon such shipments; nor do they admit that the shipments are covered by the Commission's findings, or that the claims were filed or presented within the statutory period, or that complainant(s) paid or bore the charges or was (were) damaged thereby, or is (are) entitled to reparation in any amount. The carriers expressly reserve all of their legal rights to contest and resist the payment of any award of reparation which may be based upon the Rule V statements above certified and in checking and certifying these statements they do not admit liability in any way or to any extent or for any purpose.

"The undersigned hereby certifies that this statement has [fol. 35] been checked against the records of this Company, and the information therein contained has been found to be correct as to character and date of the shipments, weight, origin and destination, routes of movement, rate, and amount collected."

(9) It is further agreed and admitted that defendant engaged and employed a traffic expert to represent it before the Interstate Commerce Commission in the matter of its claim for reparation and contracted and agreed to pay said representative a contingent fee of fifty (50%) per cent of whatever sum it collected by way of reparation

from the Missouri Pacific Railroad Company and other carriers, and that upon receipt of the said sum of twenty-three thousand, nine hundred ninety-four and 33/100 ($23,994.33) dollars from the Missouri Pacific Railroad Company the defendant immediately, and at the time said payments were received, paid to its said traffic expert representative fifty (50%) per cent of said sum so received, and that said payment to its representative was more than five (5) years prior to the demand of the return of said reparation by the Missouri Pacific Railroad Company, which was made October 30, 1934; that the remainder of said sum was by the defendant distributed by way of dividends to its stockholders and used for general corporate purposes.

(10) It is further admitted and agreed that after payment of the sum of twenty-three thousand nine hundred ninety-four and 33/100 ($23,994.33) dollars by the Missouri Pacific Railroad Company to the Scott County Milling [fol. 36] Company, the said Missouri Pacific Railroad Company collected three thousand six hundred nineteen and 11/00 ($3,619.11) dollars of said amount from the following connecting carriers:

Illinois Central Railroad Company;
C. C. C. & St. Louis Railroad Company;
Wabash, Chester & Western Railroad Company;
Mobile & Ohio Railroad Company.

(11) It is further agreed that at the time the reparation orders were issued and prior thereto, there was in force and effect Rule XV (e) of the Interstate Commerce Commission's Rules of Practice, which had theretofore been adopted and promulgated by the Interstate Commerce Commission, which said rule is as follows:

"A petition for rehearing that part of any case relating to reparation must be filed within sixty (60) days after service of a report therein;

and that prior to April 26, 1930, the Interstate Commerce Commission had adopted Rule XV (f) of said Commission's Rules of Practice, which said rule was in force and effect during the years 1931, 1932 and 1933, which said rule is as follows:

"A second application under paragraph (a) of this rule for a rehearing, reargument, reconsideration or for the

vacation of any order by the same party or parties and upon the same ground as a former petition or application which has been considered and denied, will not be entertained."

And it is further admitted and agreed that immediately upon the entering of the orders of reparation to be paid the Scott County Milling Company by the Missouri Pacific [fol. 37] Railroad Company and connecting lines, service of report of the Commission therein was made upon the Missouri Pacific Railroad Company and connecting lines, and that service of said report had been made on the Missouri Pacific Railroad Company and connecting lines more than sixty (60) days prior to the filing of the petition for rehearing filed September 7, 1929; October 17, 1929; April 26, 1930, and June 3, 1931, but, not sixty days prior to the filing of the petition for rehearing filed on or about the 25th day of April, 1929.

(12) It is further admitted and agreed that on the complaint of the Scott County Milling Company the Interstate Commerce Commission, in its original order, found that the rate on bituminous coal from Southern Illinois and Western Kentucky fields to Sikeston and other points in Southeast Missouri of two and 13/100 ($2.13) dollars and two and 38/100 ($2.38) dollars, respectively, were unreasonable and ordered and directed a reduction in rate to one and 63/100 ($1.63) dollars per ton from Southern Illinois and one and 88/100 ($1.88) dollars per ton from Western Kentucky, and that after the order of the Commission was entered on July 3, 1933, the Missouri Pacific Railroad Company and connecting lines filed a rate on bituminous coal from Southern Illinois of one and 75/100 ($1.75) dollars per ton and from Western Kentucky fields of two ($2.00) dollars per ton to Sikeston and other points in Southeast Missouri, these being the rates found by the Interstate Commerce Commission to be reasonable for the future.

(13) It is further admitted and agreed that attached to [fol. 38] this agreed statement of facts are copies of certain original documents, which shall be considered by the Court as evidence and as a part of this agreed statement of facts, said documents including the petition for rehearing dated April 25, 1929; petition for rehearing dated September 7, 1929; petition for modification of order dated October 17,

1929; petition for general investigation dated April 26, 1930; supplemental petition for reopening, reargument and general investigation of coal rates dated June 3, 1931; report and order of the Interstate Commerce Commission in case 16,323, dated July 12, 1926; report and order of the Interstate Commerce Commission in case 16,323, dated July 10, 1928; supplemental order of the Interstate Commerce Commission in case 16,323, dated March 11, 1929; order of the Interstate Commerce Commission in case 16,323, dated November 2, 1931; order of the Interstate Commerce Commission in case 16,323, dated July 3, 1933; order of the Interstate Commerce Commission in case 16,323, submitted February 3, 1933, decided July 3, 1933. It is further stipulated and agreed that upon the submission of this case to the Court, either party, plaintiff or defendant, may offer additional evidence, and that such additional evidence offered shall be considered in connection with this agreed statement of facts.

(14) It is further stipulated and agreed that while the facts herein admitted are true, their admission herein shall not operate as a waiver by either party of the immateriality or incompetency of such facts and that either party may [fol. 39] offer specific objections thereto at any time before final decision of this cause by the trial court.

Thos. J. Cole, H. H. Larimore, C. M. Spence, Dearmont, Spradling & Dalton, Attorneys for Plaintiffs.
Bailey & Bailey, Finch & Finch, Attorneys for Defendant.

The original documents referred to in section 13 of the agreed statement of facts, and offered in evidence with it, are marked "Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11," and are as follows:

EXHIBIT No. 1

Exhibit No. 1 in substance is a petition of the defendants before the Commission in the case of Scott County Milling Company et al. v. Butler County Railroad Company et al., Docket No. 16,323, for rehearing and/or reconsideration on the record as made, and for reargument.

The petition called to the attention of the Interstate Commerce Commission the fact that the case had already

been twice heard and passed upon by the full Commission, set out the probable amount of reparation involved, and made reference to three other cases then pending before the Commission involving practically the same issues.

The prayer of the petition was, in view of the large sums [fol. 40] involved and the serious effect on the revenues of defendants, that the docket should be reopened for rehearing or reconsideration in connection with the similar cases pending.

The petition was dated April 25, 1929.

EXHIBIT No. 2

Exhibit No. 2 is the third petition of defendants for rehearing and/or reconsideration on the record as made, and reargument in the case before the Interstate Commerce Commission known as the Scott County Milling Company et al. v. Butler County Railroad Company et al., I. C. C. Docket No. 16,323. It is dated September 7, 1929, and was filed by the defendants in that case operating in the southwestern part of the United States, including Missouri and Arkansas. It prayed that the Commission set aside its order theretofore made in the case last above referred to, and set out a list of cases that had been filed with the Commission following the case in which the petition was filed.

The prayer was that if the Commission would reopen the Scott County case, the defendants in that case would present at the rehearing a proposed scale of rates which would be nondiscriminatory and probably satisfactory to the shipping interests involved.

EXHIBIT No. 3

Exhibit No. 3 is a petition for modification of the order, of the Commission entered in the case referred to in Exhibits Nos. 1 and 2, and for brevity also referred to as the [fol. 41] Scott County Milling Company case or the Scott County case.

This petition for modification is dated October 17, 1929, and was filed by attorneys for Southwestern carriers, including Missouri Pacific Railroad Company. It asked that the Commission modify its order theretofore entered in the

Scott County Milling Company case in order to enable the carriers, defendants therein, to propose an entirely new adjustment of coal rates to the territory involved.

In support of such petition it was stated that the publication of rates prescribed in the Scott County case had invited vexatious litigation before the Commission; that such rates had disrupted a competitive adjustment of long standing from mines in Southern Illinois, Western Kentucky and Alabama, and that the present adjustment was a piece-meal adjustment, illogical and inconsistent.

EXHIBIT No. 4

Exhibit No. 4 is a petition dated April 26, 1930, filed by The Chicago, Rock Island and Pacific Railway Company, Chicago and Eastern Illinois Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Illinois Central Railroad Company, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, and St. Louis Southwestern Railway Company with the Interstate Commerce Commission in the Scott County Milling Company case, I. C. C. Docket No. 16,323, and other dockets, for a general investigation of rates on coal, carloads, and for a reopening and consolidation of the Scott [fol. 42] County Milling Company case, and other cases, with such general investigation, and for a consolidation with such general investigation of cases pending as named in Appendix A to the petition.

In support of such petition the carriers, parties thereto, set out the origin territory involved, the destination territory involved, and what carriers should be made respondents, if the general investigation requested by the Commission was ordered. There was also set out a general description of the territory involved and history of the rates, past and present, in such territory. Also, it was alleged in such petition that the situation then existing was breaking up the existing relationship of rates from mines in Southern Illinois, Western Kentucky and Alabama to the territory involved.

A list of the cases pending before the Commission involving rates on coal from such origin points to such destination territory was set out in the petition.

It was also stated that rates from origin points to destination points involved could not be revised satisfactorily to all parties except through the medium of a general investigation.

The prayer of the petition was as follows:

"Your petitioners, therefore, respectfully request that the Commission order and conduct the general investigation hereinbefore particularly described; that it reopen, except as to reparation, the Scott County Milling Company, East St. Louis Cotton Oil Company, and John F. Evans Cases, supra, and consolidate such cases for further hearing with such general investigation; that as to the cases shown in [fol. 43] appendix A, an order be entered staying proceedings in all of such cases, except as part of such general investigation, and consolidate such cases with the general investigation, further proceedings being held therein in connection with such general investigation."

EXHIBIT No. 5

Exhibit No. 5 is a supplemental petition of certain carriers, including Missouri Pacific Railroad Company, dated June 3, 1931, and filed with the Interstate Commerce Commission in the Scott County Milling Company Case, Docket No. 16,323, and other cases, for reopening, consolidation, and argument of the Scott County Milling Company Case, and other cases named in Appendix A to such petition. That such reopening be before the entire Commission, or, in the alternative, a reopening and consolidation of such cases with general investigation of coal rates prayed for in petition dated May 15, 1931.

In support of such petition there appeared a brief history of the relationships existing in connection with the rates involved. At page 2 of the exhibit it was stated:

"The Scott County Milling Company case, supra, involved future rates and reparation. The reparation has been paid, the rates prescribed made effective, and the case is asked to be reopened for the purpose of having the Commission prescribe for the future a different and higher basis of rates."

It was also stated in that petition as follows:

"The carriers know that the report and order in the [fol. 44] Scott County Case are and were erroneous, and they have time and again asked the Commission to undo what was done in the Scott County Case. The reparation has long since been paid in that case and has also been paid in the East St. Louis Cotton Oil case and probably cannot be recovered back, but if the Commission erred in the Scott County case, and in the opinion of the carriers, which we think well founded, it certainly did, it should at this time, in so far as it is possible to do so, restore to the carriers that which should never have been taken away from them. Because some of the litigants received reparation in the Scott County and East St. Louis Cotton Oil cases to which they were clearly not entitled, is no ground for continuing to permit other litigants similarly situated to continue the process of extracting money from the carriers that should in equity and good conscience remain in the treasuries of the carriers."

"That petitioners and other carriers involved may have the benefit of reasonable rates on coal, and that revenue sorely needed may not be further depleted through payments of reparation awarded on a basis unreasonably low, it is earnestly urged that this petition be granted, and that the Commission, by proper orders in the cases shown in the caption of this petition and shown in Appendix A hereto, reopen, vacate the orders entered therein, and consolidate such cases and set down the same for argument before the entire Commission for the purpose of determining the reasonableness of rates for the future and for the past; or, in the alternative, reopen, vacate the orders entered therein and consolidate such cases with a general investigation of coal rates prayed for in petition, dated May 15, 1931, if and when such general investigation is ordered."

[fol. 45]

EXHIBIT No. 6

INTERSTATE COMMERCE COMMISSION

No. 16323

SCOTT COUNTY MILLING COMPANY et al.

v.

BUTLER COUNTY RAILROAD COMPANY et al.

Submitted January 25, 1926. Decided July 12, 1926

Rates on Bituminous Coal from Points in Southern Ilinois and Western Kentucky to Points in Southeastern Missouri and Northeastern Arkansas Found Unreasonable. Reasonable Rates Prescribed for the Future. Reparation Awarded.

Report of the Commisison

Division 1, Commissioners Esch, Lewis, and McManamy

By Division 1:

Exceptions to the report proposed by the examiner were filed by complainants, and the case was orally argued. Our conclusions differ from those recommended by him.

Complainants, corporations and individuals located at various points, allege that the rates on bituminous coal from points in southern Illinois and western Kentucky to destina-[fol. 46] tions in southeastern Missouri and northeastern Arkansas were and are unreasonable. We are asked to prescribe reasonable rates for the future and to award reparation on shipments made within the statutory period. The Illinois Coal Traffic Bureau, a voluntary organization of coal companies mining and shipping coal from Illinois, intervened but introduced no evidence. Rates and fractions thereof will be stated in amounts per ton of 2,000 pounds.

The destinations are on the St. Louis-San Francisco, hereinafter called the Frisco, the St. Louis Southwestern, and the Missouri Pacific. The shipments originated at mines in southern Illinois and western Kentucky, of which the Herrin and Murphysboro groups on the Missouri Pacific, the Southern Illinois, Belleville, and West Kentucky groups on the Illinois Central, and the Marion group on the Chicago & Eastern Illinois, are representative. They moved at joint rates over various routes to Thebes, Ill., thence over the Thebes bridge across the Mississippi River, and the rails

of the three delivering carriers to the 23 destinations named in the complaints. Wyatt, Mo., on the St. Louis Southwestern, is the farthest destination point. Its average distance from the Herrin and Murphysboro groups is 187.8 miles, from the Southern Illinois and Belleville groups 205 miles, and from the Marion group 193.8 miles. The nearest is Oran, Mo., on the Frisco, average distances of 91.2, 108.4, and 97.2 miles, respectively, from the foregoing groups.

To demonstrate the unreasonableness of the rates attacked, complainants rely upon comparisons with the rates to St. Louis, Crystal City, Ste. Genevieve, St. Marys, Cape [fol. 47] Girardeau, Illmo, and Chaffee, Mo. Crystal City, Ste. Genevieve, St. Marys, and Cape Girardeau are on or near the west bank of the Mississippi River between St. Louis and the west end of the Thebes bridge. Illmo and Chaffee are not river points but are intermediate to and take the same rates as Cape Girardeau on traffic moving over the Thebes bridge. The following table, taken from complainants' exhibits, shows the distances and rates from certain of the origin groups to representative destinations and to the seven points above referred to.

(Omitted in printing.)

In West Kentucky Coal Bureau v. I. C. R. R. Co., 62 I. C. C. 686, we found the rates on coal, in carloads, from western Kentucky to points in southeastern Missouri and northeastern Arkansas unduly prejudicial to the extent that they might exceed by more than 25 cents the contemporaneous rates from the southern Illinois group. Rates from western Kentucky to these destinations are now published on that basis in practically all instances, and any reductions in rates from southern Illinois would automatically result in a reduction in rates from western Kentucky. The rates from the southern Illinois mines, as modified by general rate changes, have been in effect for many years.

Most of the destinations are on the Frisco, and to such destinations the traffic is handled by the Chicago & Eastern Illinois from Thebes to the Chaffee yards, thence over the Frisco. Complainants point out that the direction of movement beyond Chaffee apparently determines the measure of the rate. For example, the rate on shipments from southern Illinois mines on the Missouri Pacific, Illinois, Central, and Chicago & Eastern Illinois, moving northward from [fol. 48] Chaffee to Cape Girardeau, 12.3 miles from Chaffee,

is $1.34, whereas on shipments from the same mines moving southward from Chaffee to Oran, 7 miles from Chaffee, the rate is $1.94, and to Morley, 6.7 miles south of Oran, it is $2.07. They observe also that as the distance beyond Chaffee increases the rate per ton per mile over Chaffee also increases, contrary to the principle that as distance increases ton-mile earnings should decrease. From the Herrin and Murphysboro groups to Illmo, Chaffee, and Cape Girardeau the average ton-mile earnings are 18.9, 15.9, and 13.9 mills, respectively. To the destinations herein they range from 13.3 to 21.2 mills.

The record clearly indicates, and defendants admit, that measured mile for mile the rates to these destinations are higher than the rates to the seven points referred to by complainants. Defendants urge, however, that all these latter points except Illmo and Chaffee are on or contiguous to the west bank of the Mississippi River; that through the Thebes gateway Illmo and Chaffee are intermediate to Cape Girardeau and consequently take the same rates under fourth-section requirements; the rates to these west-bank points are depressed by conditions which do not obtain at interior points; and that it is therefore unfair to use such rates to measure the reasonableness of the rates to the destination points herein. If this is done, they assert, wholesale reductions will result in rates to the Southwest generally, both from the southern Illinois mines and from the Alabama mines, the rates from which are related to the rates from the southern Illinois mines.

In support of their contention that the rates to the west-bank points are subnormal, defendants cite Peerless White [fol. 49] Lime Co. v. C. & E. I. Ry. Co., 95 I. C. C. 260, in which we found that the rates on coal from southern Illinois fields to Ste. Genevieve were not unreasonable. Complainants, however, stress the fact that defendants have submitted nothing specific in support of their contention that rates to these west-bank points are depressed, and they cite some of our previous decisions, which they assert refute it. In West Kentucky Coal Bureau v. I. C. R. R. Co., 66 I. C. C. 288, defendants asked permission and were authorized to establish a rate of $1.985 on coal from Western Kentucky mines on the Illinois Central via Thebes to Crystal City and intermediate points on the Frisco, including Ste. Genevieve. This rate, reduced to $1.79 on July 1, 1922, was made a

differential of 42.5 cents over the contemporaneous rate of $1.56 from the southern Illinois group to Crystal City via St. Louis. The rate of $1.79 and the rates of $1.735 and $1.59 from the same mines to St. Louis and Cape Girardeau, respectively, apply for much greater distances than do the higher rates to the destinations herein and apply via both Ohio and Mississippi River crossings, whereas the haul from southern Illinois requires only the one river crossing at Thebes. In Cape Girardeau Commercial Club v. I. C. R. R. Co., 51 I. C. C. 105, we approved a rate of 90 cents which the carriers had voluntarily established from southern Illinois coal fields on the Illinois Central and Chicago & Eastern Illinois to Cape Girardeau. That rate, as modified by the general rate changes, has become $1.34, the present rate. In Coal from Illinois Mines, 85 I. C. C. 105, the carriers were refused permission to increase the rate from Mobile & Ohio [fol. 50] mines in southern Illinois via St. Louis to Cape Girardeau from $1.34 to $2.43.

It is fairer, defendants assert, to compare the rates under attack with those to other points in the interior of Missouri. Such comparisons, made by them, show that rates for comparable distances to selected interior Missouri points are relatively the same as or higher than those under attack. Rates for hauls of comparable distances between various points throughout other territories are also instanced. For example, they compare a rate of $2.25 from the Jackson district of Ohio to Marion, Ind., an average haul of 143 miles, with the rate of $2.25 from the southern Illinois group to Dexter, Mo., 130 miles. A rate of $2.38 from the Hocking Valley, Ohio, district to Cincinnati, Ohio, average distance 175 miles, is compared with the rate of $2.55 from the southern Illinois group to Kennett, Mo., 174 miles. An examination of the tariffs indicates that the $2.38 rate was in effect prior to July 1, 1922, when it became $2.14. This rate, they state, moves thousands of tons of coal, and there is no such expensive bridge crossing as at Thebes. Defendants lay great stress on the expensive Thebes bridge crossing, but it should be noted that shipments to Cape Girardeau and Chaffee, for example, also cross this bridge. They contend, moreover, that these rates apply in territories of much heavier traffic density than prevails in southeastern Missouri. Aside from these general statements as to traffic density and the absence of bridge crossings, there is no

showing of the conditions under which these rates were established, and their value for comparative purposes is, of course, lessened to that extent.

Defendants also compare the rates under attack with [fol. 51] those in effect for intrastate movements within Missouri and Arkansas. As compensation for the Thebes bridge crossing they have added 40 cents to these intrastate rates, which is the amount the Chicago & Eastern Illinois receives for transporting coal from Thebes to Chaffee. When plussed by 40 cents these intrastate rates are generally higher than the rates under attack.

In Perry County Coal Corp. v. E. St. L. & S. Ry. Co., 80 I. C. C. 711, we found that the group rate of $1.16 on coal from O'Fallon and Belleville, Ill., both located on the western edge of the Belleville group, to St. Louis was not unreasonable. O'Fallon and Belleville are 10.5 and 6.7 miles, respectively, from East St. Louis. Using the average weighted haul of 8.5 miles from East St. Louis to points in the St. Louis switching district, as shown in the Illinois Coal Cases, 32 I. C. C. 659, the distances from O'Fallon and Belleville would be about 19 and 15.2 miles, respectively. The average distance to St. Louis from the Belleville group is 30.5 miles and the rate is $1.16. The average distance to Oran from the Murphysboro and Herrin groups on the Missouri Pacific, as shown hereinbefore, is 91.2 miles and the rate is $1.94.

In L'Anguille River Ry. v. I. C. R. R. Co., 83 I. C. C. 521, we found that the rates on lump coal, in carloads, from mines in western Kentucky to Marianna, Ark., an interior point, were not unreasonable or otherwise unlawful. The complainants therein sought the rate to Helena, Ark., a river point, but we found that rates to Mississippi Valley territory constituted no proper measure of the reasonableness of rates to interior points in Arkansas. Since we have a [fol. 52] different and more complete record to consider, it does not necessarily follow that we should reach the same conclusion here.

We find:

1. That the rates assailed from southern Illinois mines, were, are, and for the future will be, unreasonable to the extent that they exceeded, exceed, or may exceed the following amounts per ton of 2,000 pounds:

To Oran, Mo.	$1.44
To Morley, Vanduser, and Tanner, Mo.	1.57
To Sikeston, Champion, Swinton, Canalou, Charleston, Noxall, Bertrand, and Brown's Spur, Mo.	1.63
To Dexter and Essex, Mo.	1.75
To Lilbourn, Mo.	1.93
To Deventer, Fisk, East Prairie, Vator, Anniston, and Wyatt, Mo.	1.99
To Kennett, Mo.	2.05
To Piggott, Ark.	2.11

2. That the rates assailed from west Kentucky mines to the same destinations were, are, and for the future will be, unreasonable to the extent that they exceeded, exceed, or may exceed the amounts indicated in the preceding paragraph, plus 25 cents per ton of 2,000 pounds.

3. That complainants made shipments at rates herein found unreasonable, paid and bore the charges thereon, and were damaged in the amount of the difference between the charges paid and those that would have accrued at the rates herein found reasonable, and are entitled to reparation with interest. Complainants should comply with Rule V of the Rules of Practice.

An order for the future will be entered.

[fol. 53] EXHIBIT No. 7

INTERSTATE COMMERCE COMMISSION

No. 16323

SCOTT COUNTY MILLING COMPANY et al.

v.

BUTLER COUNTY RAILROAD COMPANY et al.

Submitted October 14, 1927. Decided July 10, 1928

Upon Further Hearing Findings in Previous Report, 113 I. C. C. 675, that Rates on Coal, in Carloads, from Points in Southern Illinois and Western Kentucky to Destinations in Southeastern Missouri and Northeastern Arkansas Were and Would be Unreasonable, Affirmed with Modifications as Indicated.

Report of the Commission on Further Hearing

By the COMMISSION:

Exceptions were filed by complainants and defendants to the report proposed by the examiner and the cases were orally argued.

In the previous report, 113 I. C. C. 675, division 1 found that the rates on coal, in carloads, from points in southern Illinois and western Kentucky to destinations in southeast- [fol. 54] ern Missouri and northeastern Arkansas were and would be unreasonable. Reasonable rates, 50 cents per ton lower, were prescribed for the future and reparation awarded on shipments moving within the statutory period. Upon defendants' petition the cases were reopened for further hearing and the effective date of the order requiring the reduced rates for the future was indefinitely postponed. No order for reparation had been entered. Rates will be stated in amounts per ton of 2,000 pounds.

Upon rehearing the Fifth & Ninth Districts Coal Traffic Bureau, representing operators in the Belleville group in southern Illinois, intervened, seeking certain reductions hereinafter mentioned, while the Alabama Mining Institute, representing operators in the vicinity of Birmingham, Ala., intervened to oppose any reductions in the existing rates. The Illinois Coal Traffic Bureau, representing producers generally in Illinois, except those in the Belleville group, was already a party by intervention in support of the complaint.

The traffic originates and terminates on various lines. Except for that originating on the Louisville & Nashville, the Southern, and certain short lines, which goes via East St. Louis, Ill., the traffic moves directly to Thebes, Ill., there crosses the Mississippi River, and then turns southward at Chaffee, Mo., which is about 16 miles west of Thebes. Complainants and defendants differ as to the average distances from the southern Illinois mines to the destinations here considered. Roughly speaking, however, the evidence indicates that the average distance from such mines on the Missouri Pacific, Chicago & Eastern Illinois, and Illinois Central, to Thebes approximates 75 or 80 miles, and that the distances beyond Thebes average from about 25 miles to [fol. 55] Oran, 60 miles to Essex to 120 miles at Wyatt.

Complainants' case was and is grounded mainly on the fact that the rates assailed are on a much higher level than those to Chaffee and several other points in Missouri north thereof on or near the Mississippi River. For instance, from southern Illinois to Oran, Mo., about 7 miles south of Chaffee, the rate is $1.94, while to Cape Girardeau, about 12 miles north of Chaffee, it is $1.34. The traffic to the destina-

tions north of Chaffee, like that here dealt with, generally passes through Chaffee. The following table, taken from complainants' data, compares the rates to four representative destinations south of Chaffee; namely, Oran, Dexter and Kennett, Mo., and Piggott, Ark., with the lower rates to several points north of Chaffee the distances being computed via the St. Louis-San Francisco unless otherwise specified. The rates previously prescribed are also shown:

(Table omitted in printing.)

In conformity with West Kentucky Coal Bureau v. I. C. R. R. Co., 62 I. C. C. 686, the rates from western Kentucky are, as may be seen, 25 cents higher than those from southern Illinois and the same relationship was continued in the rates hereinbefore prescribed.

Contrary to the rule that ton-mile earnings should ordinarily decrease with distance, the rates assailed yield more than do those to Chaffee. Those previously prescribed more nearly approximate, mile for mile, the rates to Chaffee and the points north thereof.

Complainants sought to prove that the transportation [fol. 56] conditions south of Chaffee are more favorable than those north thereof. In some respects they apparently are, but on this record it would be difficult to say just how they compare in the aggregate. Suffice it to say that defendants practically admit for the purposes of this case that there is no substantial difference in the conditions.

In St. Joseph Lead Co. v. L. & N. R. R. Co., 101 I. C. C. 352, a rate was prescribed on coal from certain mines on the Louisville & Nashville in western Kentucky to Bonne Terre, Rivermines, and Leadwood, Mo., which with the 10 per cent reduction of July 1, 1922, would be the equivalent of a rate of $2.43. The destinations named are north of Chaffee. The hauls approximate 270 miles. For similar and somewhat shorter distances the rates assailed range from $2.74 to $2.86.

As may be seen from the following table, the rates to Oran, Charleston and Fisk, Mo., apparently representative of the rates assailed, are high compared with those from Kansas and Missouri mines to destinations in Kansas and Missouri; those from the same points to lower Missouri River cities, prescribed in Southwestern Coal Operators' Asso. v. A. W. Ry. Co., 89 I. C. C. 73; and those from the

head of the lakes to destinations in Minnesota, North Dakota and South Dakota, prescribed in Holmes & Hallowell Co. v. G. N. Ry. Co., 69 I. C. C. 11:

(Table omitted in printing.)

For the initial portions of the hauls the rates assailed apply in a lower rated territory than that in which the rates above shown to the Missouri River cities apply. The rates [fol. 57] to the latter points, however, are evidently for one-line hauls and do not in all instances embrace transriver transportation.

On behalf of complainant it is also shown that the rates assailed are high compared with those for hauls of similar lengths in central territory. The following table is illustrative:

(Omitted in printing.)

For similar distances the present rates considerably exceed, and those hereinbefore prescribed are considerably less than, those found reasonable on mine timbers from points in Missouri to destinations in Illinois in Palmer v. M. P. R. R. Co., 87 I. C. C. 622. Coal moves in greater volume and generally under more favorable transportation conditions than mine timbers.

Defendants point out that in both the origin and destination territories a large amount of branch-line service is required in many instances; and also state that for the most part the rates are joint, applying over two or more lines. Complainants show, however, that single-line rates are applicable over the Missouri Pacific to 10 of 23 destinations here considered.

Defendants compare the rates assailed with rates prescribed or approved by this commission for application from and to various points in the territory east of the Mississippi River, where they regard transportation conditions as generally more favorable than from and to the points under consideration. The following table is taken from data of record:

(Omitted in printing.)

[fol. 58] Defendants contend that in making rate comparisons we should take into account the fact that the traffic embraced by these cases must cross the Mississippi River.

In a case concerning divisions between the St. Louis-San Francisco and the Chicago & Eastern Illinois the 16-mile haul performed by the last-named carrier between Thebes and Chaffee was found to be worth 40 cents per ton. Jackson v. St. L.-S. F. Ry. Co., 66 I. C. C. 359.

Defendants also offer evidence to the effect that the rates assailed are not high compared with those to other destinations in Missouri, west and southwest of St. Louis. The following table is typical:

(Omitted in printing.)

In connection with these comparisons, however, it should be noted that the traffic to southeastern Missouri does not ordinarily pass through the St. Louis district.

Generally speaking, on the basis of the distances used by the defendants, which considerably exceed those shown by complainants, the rates assailed are much higher than, and those previously prescribed roughly approximate, those prescribed in Memphis-Southwestern Investigation, 77 I. C. C. 473, for general application on sand in that portion of the Southwest lying generally east of the Kansas City Southern, with 20 cents per ton added to represent the Mississippi River transfer. The present rates are generally somewhat lower for similar distances than those prescribed for brick in the above-cited case, with nothing added for the river transfer.

In answer to complainants' principal comparisons, de- [fol. 59] fendants urge that the rates to Chaffee and the points north thereof are subnormal. This matter was quite fully considered in the previous report and several cases were cited which tended to refute defendants' contention. The rates to Crystal City represent reductions made to prevent a large consumer of coal at that point from resorting to certain barge operations, and have brought about reductions to certain intermediate points like Ste. Genevieve. So far as appears, the rates to Crystal City have not depressed the rates to Cape Girardeau and Chaffee, and there is no convincing showing that any of these rates, except possibly as applied over circuitous routes, are less than reasonable maxima.

The rates previously prescribed were for application from southern Illinois, including the Belleville group, and from western Kentucky over all defendants' available

routes, whether operating directly through Thebes or indirectly through East St. Louis, Ill. The present record shows that the carriers whose routes are through East St. Louis are in a different position from those whose routes are through Thebes. The routes through East St. Louis are principally those of the Louisville & Nashville, the Southern, and other so-called east-and-west lines and are much longer. From the Belleville group on these lines the average added distance is nearly 50 miles and from the southern Illinois group it is perhaps two or three times as much. On account of the longer hauls the present rates through East St. Louis are materially higher than those through Thebes. There appears to be no definite relationship between the rates through the respective gateways, except that from the Belleville group to points on the Missouri Pacific [fol. 60] the rates through East St. Louis are made on a differential of 13 cents over those through Thebes. The Southern is willing to continue this differential in the event the rates through Thebes are reduced, but the Louisville & Nashville urges that no reduction should be made from points on its line. There is little, if any, movement from such points. The rates of the Louisville & Nashville compare favorably with those for similar distances from and to other points in the same general territory. It accordingly asks that the previous findings and order be amended so as to exclude the rates from points on its line. The Belleville interests contend that all the rates from the Belleville group through East St. Louis should be differentially related to those through Thebes. The 13-cent differential applying to points on the Missouri Pacific was established some years ago when the rates from the southern Illinois group to Chicago and the Northwest were 13 cents above those from the Belleville group. As a result of The Illinois Coal Cases, 1920, 62 I. C. C. 741, however, the 13-cent differential on northbound traffic has been reduced to 10 cents. The Belleville interests, therefore, urge that a differential of 10 cents would be proper for the traffic here under consideration. It should be noted, however, that the hauls here dealt with are relatively short.

From a consideration of the record in these proceedings as now made, we see no justification for a modification of our former findings except as applied to rates via East St. Louis and to rates from western Kentucky mines on the Louisville

& Nashville not embraced by the proceedings. We accordingly find:

1. That the rates assailed from points in southern Illinois, [fol. 61] as hereinbefore described, except those applicable through East St. Louis, were, are and for the future will be unreasonable to the extent that they exceeded, exceed, or may exceed the following in amounts per ton of 2,000 pounds:

To Oran, Mo.	$1.44
To Morley, Vanduser, and Tanner, Mo.	1.57
To Sikeston, Champion, Canalou, Charleston, Noxall, Bertrand, and Brown's Spur, Mo.	1.63
To Dexter and Essex, Mo.	1.75
To Lilbourn, Mo.	1.93
To Deventer, Fisk, East Prairie, Vator, Anniston, and Wyatt, Mo.	1.99
To Kennett, Mo.	2.05
To Piggott, Ark.	2.11

2. That ~~the rates~~ assailed from western Kentucky mines, as hereinbefore described, except those applicable through East St. Louis, to the above destinations were, are, and for the future will be, unreasonable to the extent that they exceeded, exceed, or may exceed the amounts indicated in the preceding paragraph, plus 25 cents per ton of 2,000 pounds.

3. That complainants made shipments at rates herein found unreasonable, and paid and bore the charges thereon; that they were damaged in the amount of the difference between the charges paid and those that would have accrued at the rates herein found reasonable; and that they are entitled to reparation, with interest. Complainants should comply with Rule V of the Rules of Practice.

An appropriate order for the future will be entered.

Commissioner Farrell did not participate in the disposition of these cases.

[fol. 62] EXHIBIT No. 8

Supplemental Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of March, A. D. 1929.

No. 16323

SCOTT COUNTY MILLING COMPANY et al.

v.

BUTLER COUNTY RAILROAD COMPANY et al.

No. 16323 (Sub-No. 1)

SAME

v.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY et al.

No. 16323 (Sub-No. 2)

DEXTER ICE, FUEL & POWER COMPANY

v.

CHICAGO & EASTERN ILLINOIS RAILWAY COMPANY et al.

No. 16323 (Sub-No. 3)

R. B. BOWMAN

v.

CHICAGO & EASTERN ILLINOIS RAILWAY COMPANY et al.

It appearing, That on July 12, 1926, the commission, by division 1, entered its report, and on July 10, 1928, its report on further hearing, in the above-entitled proceed-[fol. 63] ings, which reports are hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing, among other things, the dates on which payment of the charges assailed was made; we find that complainants shown in the following table are entitled to awards of reparation from the de-

fendants named below in the amounts set opposite their respective names, with interest.

Complainants	Defendants	Amounts
Scott County Milling Company	MP	$14,242.93
Do	IC and MP	5,618.68
Do	CCC&StL and MP	187.34
Do	WC&W and MP	70.20
Do	M&O and MP	23.42
B. W. Bowman	MP	2,546.89
Do	IC and MP	186.11
B. W. Bowman	CCC&StL and MP	232.84
Do	MI and MP	111.92
Mississippi County Elevator Company	MP	533.84
Do	IC and MP	933.26
Do	MP and StLSW	61.30
Dexter Ice, Fuel & Power Company	MP	19.40
R. B. Bowman	IC and MP	150.01
E. C. Robinson Lumber Company	MP	2,389.63
	IC and MP	5,696.50
	MI and MP	72.31
	CCC&StL and MP	21.58

[fol. 64] It is therefore ordered, That the defendants, named in each of the groups, shown in the above table, be, and they are hereby, authorized and directed to pay unto the complainants shown opposite said groups, on or before April 26, 1929, the amounts set opposite their respective names in said table, with interest thereon at the rate of six per cent per annum, from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of unreasonable rates charged for the transportation of numerous carloads of coal from points in southern Illinois and western Kentucky to destinations in southeastern Missouri and northeastern Arkansas.

By the commission. A true copy:

George B. McGinty, Secretary. (Seal.)

Explanation of Abbreviations

CCC&StL	Cleveland, Cincinnati, Chicago & St. Louis Railway Company
IC	Illinois Central Railroad Company
M&O	Mobile and Ohio Railroad Company
MP	Missouri Pacific Railroad Company
MI	Missouri-Illinois Railroad Company
StLSW	St. Louis Southwestern Railway Company
WC&W	The Wabash, Chester and Western Rail Road Company, J. Fred Gilster, Receiver

[fol. 65] EXHIBIT No. 9

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 2nd Day of November, A. D. 1931.

No. 16323

SCOTT COUNTY MILLING COMPANY et al.

v.

BUTLER COUNTY RAILROAD COMPANY et al.

Upon further consideration of the records in the above-entitled proceedings, and upon consideration of supplemental petition, dated June 3, 1931, filed on behalf of the Chicago, Rock Island & Pacific Railway Company, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, and St. Louis Southwestern Railway Company for reopening, consolidation and argument of the above-entitled cases, or, in the alternative, a reopening and consolidation of the said cases with general investigation of coal rates prayed for in petition dated May 15, 1931:

It is ordered, That the said proceedings be, and they are hereby, reopened for further hearing at such time and place as the Commission shall hereafter designate.

By the Commission. George B. McGinty, Secretary.

A true copy: George B. McGinty, Secretary. (Seal.)

[fol. 66] EXHIBIT No. 10

INTERSTATE COMMERCE COMMISSION

No. 16323

SCOTT COUNTY MILLING COMPANY et al.

v.

BUTLER COUNTY RAILROAD COMPANY et al.

Submitted February 3, 1933. Decided July 3, 1933

1. Rates on coal, in carloads, from southern Illinois to destinations in portions of Arkansas and southeastern Missouri found unreasonable. Reasonable bases on rates prescribed. Reparation denied.

2. Rates on like traffic from Alabama and western Kentucky to points in the foregoing destination territory found not unreasonable, but the rate adjustment as between those origin groups and southern Illinois found unduly prejudicial. Non-prejudicial bases of rates prescribed. Reparation denied.

3. Findings in former reports, to the extent that they are inconsistent with those herein, reversed.

Report of the Commission on Further Hearing

By the COMMISSION:

Exceptions to the proposed report on further hearing were filed by the parties and they have been heard in oral [fol. 67] argument. Our conclusions differ somewhat from those recommended by the examiner. Rates will be stated in amounts per net ton and will not include the present authorized emergency charges.

The first of these cases considered by us was no. 16323, filed by Scott County Milling Company and others, with which were included sub-nos. 1 to 3, inclusive, thereto. In those cases, hereinafter referred to as no. 16323, reported at 113 I. C. C. 675, and 146 I. C. C. 559, certain rates were prescribed on coal, in carloads, from southern Illinois and western Kentucky to points in southeastern Missouri as far south as Kennett, Mo., and to Piggott, Ark., with rates from western Kentucky mines 25 cents over those from southern Illinois, and reparation was awarded to the same basis. Complaints subsequently filed, seeking reparation and rates for the future based relatively on the rates prescribed in no. 16323 included destinations in the territory bounded by Fredericktown, Mo., on the north, Doniphan, Mo., Cotter and Morrilton, Ark., on the west and Bests and Monticello, Ark., on the south.

Decisions have been issued in some of the cases, and in most, but not all, of the others proposed reports have been served. Upon defendants' petitions the cases were reopened for further hearing, and other related cases, namely, nos. 24354, 24670, 24908, 25018, and 25203, were set therewith for original hearing. The consolidated cases, other than no. 24908, cover about 161 destinations, within the territorial limits stated above. As shown in appendix A, the complaint in no. 24908 assails the rates to all points

in a large portion of southeastern Missouri and all of the eastern portion of Arkansas.

[fol. 68] Much of the evidence at the rehearing was similar to that originally introduced and was sufficiently stated in the former reports. It need not be repeated herein. Representative rates and distances as far south as Little Rock, Ark., are shown in such reports. Rates and distances to points south of Little Rock are hereinafter stated.

The complaints relate generally to the reasonableness of the rates on coal, in carloads, from southern Illinois and western Kentucky mines, but several of the complaints assail the reasonableness of the rates from the Alabama district. In no. 24908 rates on coal from southern Illinois are alleged to be unduly prejudicial to shippers in that group and unduly preferential of shippers from mines in western Kentucky and Alabama. The West Kentucky Coal Bureau and the Alabama Mining Institute, respectively, intervened in behalf of coal producers in the two States last named.

The destination territory in no. 24908 extends from a point just south of St. Louis, Mo., on and east of the line of the Missouri Pacific Railroad Company to Texarkana, Ark., and on certain branch lines. As far south as Horine, Mo., the line of the St. Louis-San Francisco Railway Company, hereinafter called the Frisco, is west of the Missouri Pacific, and under complainant's restriction of the destination territory, as shown in appendix A, the rates to Frisco points north of Horine are not in issue. Complainant also restricted the Illinois origin territory to that portion of the southern Illinois group within Franklin, Williamson, and Saline Counties, and the DuQuoin subgroup in Perry County; and its allegations apply only to the movement of [fol. 69] coal via Mississippi River crossings south of St. Louis.

The Belleville group is east and south of East St. Louis, Ill. The southern Illinois group is south of the Belleville group, about midway between the Mississippi River crossings at Thebes, Ill., and St. Louis, and embraces a number of subgroups. Rates from the Belleville group and from the southern Illinois group and subgroups differ to some extent on shipments via St. Louis, but they are generally the same to destinations in southeastern Missouri and to Arkansas. Except as otherwise indicated, when the southern Illinois group is mentioned hereinafter it will be understood to include the subgroups thereto and the Belleville group.

The western Kentucky group is generally south and southeast of Evansville, Ind., and is served by the lines of the Illinois Central Railroad Company and Louisville and Nashville Railroad Company.

Coal from most of the origin lines in southern Illinois, when for destinations on the Frisco, moves over the line of the Chicago and Eastern Illinois Railway Company beyond Thebes, Ill., to Chaffee, Mo., where it is delivered to the Frisco. The Chicago & Eastern Illinois operates over the tracks of the St. Louis Southwestern Railway Company hereinafter called the Cotton Belt, from Illmo, Mo., near the Missouri end of the Thebes bridge, to Rockview, Mo., thence over the Frisco to the Chaffee yards. The Missouri Pacific connects with the Chicago & Eastern Illinois at Thebes, and with the Frisco and the Cotton Belt at Delta, Mo., west of Chaffee.

[fol. 70] Transportation Conditions

The topography of southern Illinois and western Kentucky is rough, with severe curvatures and grades sufficiently steep, in some instances, to require the breaking up of coal trains in crossing them. At least 90 percent of the cars are hauled into the mines empty. It is necessary for the Missouri Pacific to run solid coal trains from mines on its lines in southern Illinois, because of lack of other tonnage, and when there is not sufficient coal tonnage the trains are run light from the assembly yards to the lines leading to the South. The average loading is about 50 tons. There are only three or four small mines on the Louisville & Nashville in the southern Illinois group, from which the production of about six carloads per day moves to St. Louis.

The Illinois Central line from western Kentucky branches at Paducah, Ky., to the Memphis, Tenn., and Thebes gateways. A witness for that defendant enumerated nine handlings via Paducah, from the furnishing of the empty cars to the return-empty movement, on shipments out of the western Kentucky group. With changes in the classification points, they are apparently representative of the handlings on joint-line shipments originating on other lines in western Kentucky, with fewer handlings on single-line movements. There appears to be little or no difference in the number of handlings as between these two origin groups.

Most of the haul over the Louisville & Nashville from western Kentucky to the Memphis gateway is over its Mem-

phis division. With one exception, the traffic on that division is lighter than on any other of its divisions. From [fol. 71] Atkinson, Ky., in the northern portion of the western Kentucky group, to Memphis there are 90 bridges and trestles. Due to those bridge structures and to heavy grades, not exceeding 24.6 percent of the trainloads hauled over the Cincinnati division, for example, can be hauled over the Memphis division. The engine rating for the last 60 miles of the haul into Memphis is 1,475 tons, as compared with ratings as high as 6,000 tons on other portions of the line. A check disclosed that the coal tonnage per train into Memphis averaged only 886 tons during the last 15 days of June 1932 due to decrease in coal tonnage, a condition not peculiar to the Memphis division or to the Louisville & Nashville. During May 1932 there was a deficit of $44,000 in net revenue from freight and passenger sources on the Memphis division.

All of the terminal work of the Cotton Belt at Memphis is handled by the Illinois Central under contract. The Cotton Belt uses trackage of the Rock Island from the Memphis freight terminal at Briark, Tenn., to Brinkley, Ark. Its total cost for hauling a carload of commercial coal from Memphis to Brinkley and returning the empty car to Memphis is $28.85, which includes a bridge charge of $2.47 at Memphis on loaded movements.

The bridge at Thebes is owned jointly by five of the defendants. It was placed in operation in 1905, and its cost was $3,250,496. During October 1931, in which month the Cotton Belt's greatest coal tonnage moved, that company received from its connections at Gale, Ill., an average of less than four carloads of coal per day, and at Thebes an average [fol. 72] of less than one carload. The rates proposed by defendants, hereinafter mentioned, provide for an allowance of 18 cents per ton for the bridge crossing at Thebes. In support of that allowance they point out that in Jackson v. St. L.-S. F. Ry. Co., 66 I. C. C. 359, it was found that the Chicago & Eastern Illinois was entitled to a division of 40 cents per ton for its haul on coal from Thebes to Chaffee, an important factor of which haul is the movement over the Thebes bridge. Its division is now 36 cents.

The track of the Frisco south of Cape Girardeau, Mo., consists of 104.28 miles of main line and 326.99 miles of branch line. But defendants stated that there has not been, and is not, any distinction in the rates dependent upon

whether the destinations are on main lines or branch lines, and they do not propose any such distinction. Much of the territory in southeastern Missouri and northeastern Arkansas is in a flood field, caused by overflows of the Mississippi River and its tributaries. On the Frisco north of Cape Girardeau there are seven locations subject to inundation, with an aggregate of 15 miles of main track. South of that point practically the entire Frisco mileage is subject to floods. Since 1908 flood damages to the physical property of the Frisco in the St. Louis-Memphis district approximately $1,500,000; and the total damages sustained, including damages to freight in transit, increased operating expenses by reason of circuitous routes, and similar causes, were approximately $6,000,000.

On the Missouri Pacific, 90 miles of track in the territory between Thebes and Dupo, Ill., on the eastern side of the Mississippi River, and 154 miles between Poplar Bluff, Mo., [fol. 73] and Arkla, Ark., on the western side of that river, are under levee protection; 300 miles of track in the territory south of Cliff Cave, Mo., to the Clarkesville, Ark., district are subject to direct headwater or local overflow conditions; and 90 miles of track between Hulbert and McGehee, Ark., are in the principal backwater basins of the Mississippi River. From 1910 to 1931, inclusive, the cost of restoration of its physical property, after flood damages, was $2,750,000. Segregation of the consequential damages, such as interruption of service, detour service, and damages to freight in transit, was not made by the Missouri Pacific during the earlier years in such form as to enable the carrier to prepare a statement thereof. However, such segregation was made as to the flood of 1927. In that year 696 miles of line were inundated, and 374 miles of track were damaged. The expense of keeping the lines open was $661,401, with an estimated total damage of $7,317,212, which included damages to equipment and shipments, expense of handling Red Cross supplies and refugees, and loss of business during high water.

Mississippi River Destinations North of Chaffee

In the previous report in no. 16323 we pointed out that the direction of movement beyond Chaffee apparently determined the measure of the existing rates. For example, the rate from southern Illinois on shipments moving northward from Chaffee to Cape Girardeau, 12 miles from Chaffee, was

$1.34, but the rates from the same mines on southbound [fol. 74] shipments to Oran and Morely, Mo., 7 and 13.7 miles from Chaffee, were $1.94 and $2.07, respectively.

The Frisco introduced considerable evidence concerning the reasons for what it deems to be subnormal rates on coal to Crystal City, Ste. Genevieve, St. Marys, and Cape Girardeau, Mo., north of the Thebes bridge and Chaffee, on or contiguous to the Mississippi River. Its evidence began with a history of the rate adjustment from southern Illinois mines when its line from St. Louis to Memphis was opened in 1904, about a year prior to the opening of the Thebes bridge.

A glass plant at Crystal City, about 40 miles south of St. Louis, was able to transport its coal from mines in Illinois by rail to the Wiggins Ferry incline at East St. Louis, thence by barge to Huggs Landing, near Crystal City, thence about 1 mile to the glass plant over the Crystal Railway, a line owned by the glass company. It also had the benefit of rail-barge routes through east-bank points south of East St. Louis. Another available route was over the Illinois Southern Railway, now the Missouri-Illinois Railroad, to Kellogg, Ill., thence over the ferry of that company to Thomure, Mo., and over the Frisco and the Crystal Railway. The distance from Herrin, Ill., representative of the southern Illinois group, to Crystal City over that ferry route, which is still available, is 151 miles, as compared with an average distance of 207 miles from the southern Illinois group over the all-rail route through Thebes and Chaffee. The present rate from southern Illinois mines to Crystal City is $1.40.

The average distance from southern Illinois mines to Ste. [fol. 75] Genevieve via Thebes and Chaffee is 175.6 miles, and the present rate through those points is $1.44. Consumers at Ste. Genevieve can have coal transported comparatively short distances by rail from Illinois mines to Grand Tower or Chester, Ill., thence by water. In addition, they have available nearby coal mines on the Missouri-Illinois at Sparta and Coulterville, in the Belleville group, about 29 and 36 miles distant, respectively, over the ferry route of the Missouri-Illinois, for which movement the rate is $1.34.

St. Marys is a coal-consuming point of Ste. Genevieve. It is less than 10 miles from West Chester, Mo., at which there were formerly facilities for transferring coal across the Mississippi River from Chester, Ill. This rail-water

route had an important bearing on the all-rail rates prior to 1915, when the transfer facilities were washed away.

A cement company at Marquette, Mo., within the industrial district of Cape Girardeau and about 2.5 miles from the Cape Girardeau station, consumes considerable coal. In November 1931 it received the equivalent of 88 carloads of coal by river, transported by rail to Chester, by barge to Cape Girardeau, thence to Marquette over the Frisco. Cape Girardeau and Marquette are reached by the Missouri Pacific as well as by the Frisco. In Cape Girardeau Commercial Club v. I. C. R. R. Co., 51 I. C. C. 105, a rate of 90 cents on coal from southern Illinois mines to Cape Girardeau was found justified. That rate, modified by the subsequent general increases and reductions, is the present rate of $1.34, which applies also to Marquette.

[fol. 76] Defendants urge that rates to the river points were established to meet active rail and water competition and were and are depressed. The average distances from southern Illinois mines to Cape Girardeau, St. Marys, and Ste. Genevieve are 109.5, 166.6, and 175.6 miles, respectively. The rate of $1.34 to Cape Girardeau yields 61.1 cents per car-mile and 12.2 mills per ton-mile and that of $1.44 to St. Marys and Ste. Genevieve yields 43.2 and 41 cents and 8.6 and 8.2 mills, respectively. The average distance from southern Illinois mines to Crystal City via Thebes and Chaffee is 207 miles, and the rate of $1.40 yields earning of 33.8 cents per car-mile and 6.7 mills per ton-mile. An exhibit introduced by the Frisco shows a distance of 151 miles from Herrin, as representative of the southern Illinois group, to Crystal City over the Missouri-Illinois car-ferry route, yielding earnings of 46.3 cents and 9.2 mills at the rate of $1.40. The average distance from the Belleville and southern Illinois groups to Crystal City in connection with the Missouri-Illinois, however, is stated by a witness in no. 19482 to be 103.1 miles. The earnings for that distance are 67.8 cents and 13.5 mills. Car-mile earnings herein are based on an average loading of 50 net tons.

Illmo and Chaffee are intermediate to Cape Girardeau over the Frisco, and Delta is intermediate to the same point over the Missouri Pacific. To avoid fourth-section departures, the Cape Girardeau rate of $1.34 was made applicable also to those intermediate stations. The evidence does not sustain the allegation of unreasonableness of the rates from

southern Illinois to the river points or to the intermediate points mentioned above.

[fol. 77] Fourth Section

The question arose of possible violations of section 4 of the Interstate Commerce Act, by reason of the movement beyond Thebes via Chaffee and Brooks Junction, Mo., for Frisco delivery at Illmo and stations intermediate thereto over that route. No grade is encountered between the Thebes bridge and the Cotton Belt station at Illmo. Apparently shipments for Frisco delivery at Illmo could be delivered to that line by the Chicago & Eastern Illinois or the Cotton Belt at Fremdorf, a short distance from the Frisco's Illmo station, but, in addition to the Frisco receiving little more than a switching movement, a steep grade is encountered over that route. Two routes via Chaffee have been used on shipments to Illmo on the Frisco. Over one of those the shipments move northwestwardly over the Frisco from Chaffee to Gulf Junction, at or near Marquette, thence south to Illmo. The other route is south from Chaffee to Brooks Junction, thence northwestwardly to Illmo. Morley, Benton, and Commerce are intermediate to Illmo over that route and take rates higher than the Illmo rate of $1.34.

At the rehearing a witness for the Frisco testified that prior to October 18, 1928, the applicable tariffs provided routing over the direct route in connection with the rates to points between Brooks Junction and Illmo, and that under its routing circular effective on that date the rate to Morley is restricted to apply via Chaffee and Brooks Junction, and the rates to stations between Morley and Illmo are restricted to apply via Chaffee and Gulf Junction. Those are the shortest routes affording line hauls to the Frisco. [fol. 78] Complainant in no. 21522 takes exception to that testimony, to the extent that it apparently conflicts with that given by a Frisco operating official at the previous hearing in no. 21522. It was there stated that a freight train left Chaffee three times weekly, moving via Brooks Junction and Illmo, thence west to Chaffee. Over that route there would be fourth-section departures by reason of the rates to such intermediate points as Morley, Benton, and Commerce being higher than to Illmo. The Frisco explains that there was no fourth-section allegation in no. 21522, and that, when the question of apparent fourth-section departures

was raised at the previous hearing therein, the carrier was not in a position to go fully into that phase of the matter.

There would be no fourth-section departures under the routing shown in the circular mentioned above, but a tariff check shows that the routing circular is not coupled with the rate tariffs by proper reference in such manner as to make the tariff circular effective in restricting the routing as provided therein. Nor does the tariff check verify the statement as to the routing prior to October 18, 1928. The rate tariffs in effect prior to that date and at present merely provide routing over the Frisco beyond Chaffee, without specifying direct routing or junctions.

During a certain period prior to May 11, 1930, there was a regular movement of cement from Marquette. By using the route via Chaffee and Brooks Junction the Frisco was able to pick up that cement tonnage and haul it to Chaffee, for points beyond, thereby avoiding the necessity for an [fol. 79] additional train. The present movement to Morley is over the Chaffee-Brooks Junction route, and to stations between Morley and Illmo the movement is via Chaffee and Gulf Junction, which, as stated above, are the short routes and eliminate the fourth-section departures. To remove any doubt in the future as to the application of the routing restrictions in the Frisco circular of October 18, 1928, proper reference to that circular should be made in the rate tariffs.

As to shipments originating on the line of the Illinois Central, fourth-section departures resulting from the charging of rates to stations intermediate to Illmo over the Brooks Junction route higher than to Illmo are protected by fourth-section applications nos. 2043 and 2045, filed by the Illinois Central. In connection with fourth-section departures at the rates from origins on other lines, consideration must be given to the low level of the Illmo rate of $1.34 if applied to destinations between Chaffee and Illmo, over the Brooks Junction route. To Benton and Commerce that rate would yield 11.5 and 11.3 mills per ton-mile, for distances of only 115.7 and 117.8 miles, respectively, and is considerably below the rate herein found reasonable from southern Illinois to those destinations. The distance from Chaffee to Illmo via Gulf Junction is 13.5 miles, and over the Brooks Junction route 33.5 miles. Nothwithstanding that the Frisco at times has used the more circuitous route to Illmo for operating reasons, the presumption of unreasonableness of the rates

from origins on lines other than the Illinois Central to points between Chaffee and Illmo, over the Brooks Junction route, has been overcome.

[fol. 80] Interior Destinations North of Delta

Annapolis and Fredericktown, Mo., are the most northerly of the destinations in the reopened cases. The complaint in no. 24908 includes destinations north of those points, but at the hearing that complaint was amended to apply only to coal moving via Mississippi River crossings south of St. Louis. On the line of the Missouri Pacific from St. Louis via Bismarck and Poplar Bluff, Mo., coal from the southern Illinois group to Platow, Mo., and north thereof moves across the Mississippi River from Dupo, Ill., to Carondelet, Mo., a point in the St. Louis switching district. Platow is 52.7 miles south of Bismarck, and for operating reasons is used as the dividing point for movement over the Dupo or Thebes route. On traffic over the route via Thebes the foothills of the Ozark Mountains are encountered from Arcadia, Mo., to a point near Platow, where there is a 2.15 percent adverse grade. The topography along the route via St. Louis, mentioned above, is more favorable. Furthermore, coal shipments over that route are subject to fewer handlings than over the route via Thebes.

Sufficient reason has not been shown for requiring the Missouri Pacific to change its practice of routing coal shipments to Platow and stations north thereof over the Dupo route. That route was eliminated from consideration by the statement of complainant in no. 24908, made at the hearing. The bases of reasonable rates set forth in appendix B do not include any points on the Missouri Pacific north of Fredericktown and Williamsville, Mo., or Frisco points north of Crystal City.

[fol. 81] The complainants in nos. 24067 and 24670 assail the rate only on screened coal to Annapolis, the first from Perco and Pinckneyville, Ill.; and the other from a number of southern Illinois origins. Perco and Pinckneyville are on the lines of the Missouri-Illinois and the Missouri Pacific, respectively. Annapolis is on the Missouri Pacific, about 1 mile north of Platow, and, for the reasons outlined above, shipments thereto over the Missouri Pacific move over the Dupo route, about 194 miles. Shipments from mines on the Missouri-Illinois move over the ferry route of

that line to Bismarck, thence over the Missouri Pacific to Annapolis, 112 miles from Perco. Notwithstanding the Missouri Pacific's statement as to the movement of coal to Platow and points north thereof over the Dupo route, the tariff routing apparently permits movement to Annapolis via Thebes, 214 miles, and also permits movement from Missouri-Illinois mines via the same gateway.

Prior to March 31, 1928, the rate on lump and slack coal and coal screenings from southern Illinois mines to Annapolis was $2.07. On that date the Missouri Pacific voluntarily established the present rate of $1.89 on slack coal and coal screenings, and the same rate is in effect from mines on the Missouri-Illinois. No change was made in the lump-coal rate of $2.07. The rate of $1.89 was in effect during the limitation periods in nos. 24067 and 24670. The ton-mile earnings thereunder for the distance of 194 miles from Pinckneyville over the Dupo route are 9.2 mills, and over the route via Thebes, 214 miles, 8.8 mills. For the distance of 112 miles from Perco to Annapolis, over the Missouri-[fol. 82] Illinois ferry route, the earnings are 16.8 mills. The rate of $1.89 applies from 93 coal-producing points in the Belleville and southern Illinois groups. The average distance from the origin groups to Annapolis is 149 miles, yielding 12.6 mills per ton-mile. The rate assailed is not unreasonable.

Shipments of coal from southern Illinois to Fredericktown and Jackson, Mo., on Missouri Pacific branches leading out of Delta move over routes via Thebes, and the ferry routes of the Missouri-Illinois, in connection with the Missouri Pacific, is also available to Fredericktown. The average distances from the southern Illinois mines to that point are 144.7 miles via Thebes and 138.8 miles over the Missouri-Illinois route. Reasonable rates are prescribed herein to destinations on the Fredericktown and Jackson branches, to and including those points.

Destinations South of Chaffee and Delta

Complainant in no. 22945 showed average short-line distances from 90 mine points in the southern Illinois and Belleville groups of 76 miles to Thebes and 243.5 miles to Memphis. But in arriving at the average distance of 243.5 miles to Memphis complainant split the haul of the Illinois Central in a number of instances. This is illustrated by the

routing which it shows from Pinckneyville, in the southern Illinois group, to Memphis, namely, over the Illinois Central to Murphysboro, Ill., the line of the Mobile and Ohio Railroad Company to Rives, Tenn., thence over the Illinois Central to Memphis. The Illinois Central extends from Pinckneyville to Memphis, and no good reason has been [fol. 83] shown for depriving it of the portion of the haul from Murphysboro to Rives. The average distance over the tariff route of the Illinois Central from southern Illinois to Memphis is 251 miles. The evidence does not warrant us in requiring movement from southern Illinois via the Memphis gateway. It will be left with defendants to determine whether the Thebes or Memphis gateway is to be used.

There are numerous crossings of the destination lines, necessitating care in avoiding fourth-section violations. In some instances the routes over certain lines are circuitous. For example, the route of the Cotton Belt to Bird's Point, Mo., on the Mississippi River south of Cairo, Ill., is via Delta and Dexter, Mo., to Malden, Mo., east to Lilbourn, Mo., thence northeast to Bird's Point, 206 miles, as compared with 139 miles over the direct route of the Missouri Pacific via Morley and Charleston, Mo. Another instance is West Memphis, Ark., to which the average distances from the southern Illinois group are 297.9 miles over the Missouri Pacific and 253 miles over the Frisco.

The route over the line of the Chicago, Rock Island and Pacific Railway Company, hereinafter called the Rock Island, to Newport, Ark., is very circuitous. Over the direct route of the Missouri Pacific the average distance from southern Illinois mines to Newport is 254.7 miles, as compared with 372.7 miles over the Rock Island. The Rock Island extends beyond Memphis through Mounds, Forrest City, and Brinkley, Ark., to which destinations group rates of $2.95, $2.95, and $3.05, respectively, are prescribed herein; and the Newport branch of that carrier extends [fol. 84] northwestwardly from Brinkley into a $2.85 group. A somewhat similar situation applies as to the Rock Island branch from Mesa to Searcy, Ark. Searcy is not on the Missouri Pacific, but Higginson, Ark., about 4 miles east thereof, is on the Rock Island and Missouri Pacific, with average distances from the southern Illinois mines of 372.3 and 293.2 miles, respectively. The Rock Island extends

northwestwardly from Mesa, to which a group rate of $3.20 is herein prescribed, through Higginson, a $2.95 group point. The present rate from southern Illinois mines to all points on the Brinkley-Newport and Mesa-Searcy branches of the Rock Island is $3.48. The average of the distances to Cotton Plant, Jelks, Newport, Des Arc, Griffithville, and Searcy, on those branches, is 357.3 miles, for which distance the rate of $3.48 yields 9.7 mills per ton-mile. We are of the opinion that the rate of $3.48 to stations on those branches is not unreasonable, leaving it to the Rock Island to decide to what extent it desires to meet, at its stations in the $2.80 and $2.95 destination groups mentioned above, the rates herein prescribed to those groups on the lines of other carriers.

The destination territory in no. 24908 includes all of Arkansas on and east of the line of the Missouri Pacific from Little Rock to Texarkana, Ark., and points on the Hot Springs branch. But, although exhibits give a fair picture of the present rates and distances, the reasons for the wide discrepancies in many of the rates to points south of Helena and in other portions of southern Arkansas are not disclosed. The rate from southern Illinois to Helena, 315.7 miles, is $2.49, and to Lexa, about 13 miles northwest of [fol. 85] Helena and intermediate thereto, $3.18. The $3.18 rate applies to stations on the Missouri Pacific, La Grange, Ark., 298.5 miles, to Montrose, Ark., 409.6 miles, and to points south thereof in Louisiana. Probably there is sufficient reason for the $2.49 rate to Helena yielding 7.8 mills per ton-mile, as compared with the higher rate to intermediate points, but this record does not show the reason, nor whether the rate adjustment is covered by a fourth-section application. That portion of the Missouri Pacific from La Grange to Barton Crossing, Ark., just west of Helena and now taking the $3.18 rate, is included in the group to which a rate of $3.05 is herein found reasonable. The $3.18 rate yields 10.1 mills per ton-mile to Oneida, Ark., just south of Barton Crossing; 8.2 mills to McGehee, 385.4 miles; 8 mills to Arkansas City, 397.5 miles; and 7.7 mills to Montrose, 409.6 miles.

Although the $3.18 rate applies to Dermott, Ark., on the Missouri Pacific, 393.1 miles, the rate to Monticello, Ark., on a branch line of that defendant extending westwardly from Dermott, is $4.01 for 415.8 miles. A rate of $3.78 ap-

plies from southern Illinois mines to stations on the Cotton Belt, Kent, Ark., just south of the Kingsland-Bests rate group shown in appendix B, to Stamps, Ark., 425 to 475 miles; and on the Rock Island, Tinsman, Ark., 479.5 miles, to Cornie, Ark., near the Louisiana border, 528 miles. The average of the distances from southern Illinois mines to Kent, McNeil, Stamps, Tinsman, and Cornie, all accorded the $3.78 rate, is 473.1 miles, such rate yielding 7.9 mills per ton-mile. El Dorado, Ark., on the Rock Island between [fol. 86] Tinsman and Cornie, is reached also by the Missouri Pacific over a very circuitous route, the distance being 645.8 miles as compared with 515.5 miles over the Rock Island. The rate of $3.78 applies over both routes. The ton-mile earnings over the Missouri Pacific route are 5.8 mills. The same rate also applies to stations on the Missouri Pacific, Benton to Hope, Ark., 363.7 to 452.7 miles. The average of the distances from southern Illinois mines to Benton, Malvern, Gurdon, Prescott, and Hope is 413.8 miles, the rate of $3.78 yielding 9.1 mills per ton-mile.

The rate from southern Illinois mines to Texarkana is $4.01, yielding 8.2 mills per ton-mile over the Missouri Pacific, 485 miles, and 7.8 mills over the Cotton Belt, 509 miles. The rate of $4.01 extends as far as Bradley, Ark., 498 miles, near the Louisiana border, yielding 8 mills for that distance. The rate to Hot Springs, Ark., is $4.25, for distances of 393.9 miles over the Missouri Pacific and 444.2 miles over the Rock Island, yielding 10.7 and 9.5 mills, respectively.

Defendants introduced considerable testimony in support of their contention that the rates to the territory here considered should not be based on the scale of rates prescribed in Holmes & Hallowell Co. v. G. N. Ry. Co., 69 I. C. C. 11. In a number of subsequent cases we stated that the Holmes & Hallowell scale offers a proper and convenient basis of comparison, due regard being had to differences in traffic and transportation conditions. Defendants stress the differences in the traffic and transportation conditions on coal from and to the territories here considered and on coal from the Duluth, Minn., district under the scale. To a large [fol. 87] degree, in the Duluth district, the transfer companies set the empty cars and pull the loads, but the coal companies make interplant movements with cable-car movers or box-car loaders. The average transfer move-

ment in that district is 4 miles, compared with an average movement of 11.8 miles on the Missouri Pacific in the Illinois coal fields.

Coal is loaded at Duluth only as it is ordered, and the loading and movement out of Duluth take place on the same day. The coal here considered is loaded before it is sold, and the holding for disposition entails additional switching and further use of the equipment. About 50 per cent of the coal moving out of the head of the lakes is loaded in box cars which have moved in under load. Approximately the same percentage moves out of the Duluth district to Minneapolis and St. Paul, Minn., to which defendants describe the transportation conditions as being ideal. Some of the coal is then handled out of those points for local destinations. More than 70 per cent of the coal from the Duluth district to Minneapolis and St. Paul is hauled by the Northern Pacific and Great Northern, each of which can handle trains of 5,100 tons.

Defendants' Proposed Rate Basis

Defendants stated at the rehearing that there are many inconsistencies in the present rates to the destination territory considered. As a means of correcting that situation, and to place the rates on what they consider the proper level, they introduced a table of proposed rates for appli- [fol. 88] cation as maxima for the distances therein shown. They do not favor a distance scale, but urge that such table will afford a basis for arriving at reasonable rates, either to individual destinations or to destination groups.

The proposed rates begin at $1.88 for 85 miles and end at $4.50 for 630 miles. The first block is 90 miles and over 85, followed by four blocks of 20 miles, a 15-mile block for 185 and over 170 miles, and a 5-mile block for 300 and over 295 miles. The balance of the distances is divided into 10-mile blocks. For 170 and over 90 miles the rate spreads are 20 cents for one block of 20 miles and 10 cents for each of the next three 20-mile blocks. This is followed by spreads of 10 cents for the next block, 15 miles, and 6 cents for each subsequent 10-mile block to 245 miles inclusive. For 340 and over 245 miles the rate spreads are 5 cents per block of 10 miles, except that for 300 and over 295 miles the spread of 5 cents applies for a 5-mile block. All of

the rates for distances over 340 miles are based on a spread of 4 cents per block of 10 miles.

The rates proposed by defendants are equal to those under the Missouri intrastate coal scale in effect prior to September 1, 1931, plus 18 cents per ton bridge toll at Thebes and Memphis. The rates under the Missouri intrastate scale were reduced on that date. Defendants urge that such reduction resulted from the findings with respect to interstate shipments heretofore made in no. 16323 and related cases. In support of that statement they introduced a certified copy of the State commission's order of August 21, 1930, instituting the investigation which resulted in the lower intrastate rates, in which order reference is made to [fol. 89] the rates prescribed by us to Missouri destinations.

Complainants' Contentions

The grounds for complainants' allegations as stated at the previous hearings in the cases in which reports have been issued are sufficiently shown in those reports. Those cases cover a large portion of the destination territory in the consolidated cases now before us on rehearing or original hearing. For example, of the destinations included in no. 21578, in which a proposed report has been served, 7 were included also in the findings in no. 16323, and 16 in the findings in No. 19482, East St. Louis Cotton Oil Case.

The gist of complainants' contentions at the rehearing is that the rates to points included in the previous findings should not be higher than those heretofore prescribed; that rates properly related thereto should be prescribed to the remaining destinations; and that reparation should be awarded as sought in the complaints. Reparation is not requested in no. 24908.

Complainants refer to Illinois Coal Traffic Bureau v. Arkansas Valley I. Ry. Co., 161 I. C. C. 337, in which rates were prescribed on coal from southern Illinois to points in southern Missouri on, west, and north of the line of the Frisco from St. Louis via Springfield generally equal to 88 per cent of the Holmes & Hallowell scale rates. They also refer, among other cases, to Midwest Coal Traffic Bureau v. Arkansas Valley I. Ry. Co., 173 I. C. C. 467, covering rates on coal from mines in Arkansas, Oklahoma, Missouri, [fol. 90] and Kansas to interstate destinations in Kansas and Nebraska. The rates prescribed therein approximate

90 per cent of those under the Holmes & Hallowell scale. Defendants also use the rates prescribed in the Midwest case to show that their proposed rates are not unreasonably high. In making this comparison, defendants added 7 per cent to the rates prescribed in that case, and to the result so obtained added 18 cents for the Mississippi River crossing. The addition of 7 per cent is explained by the statement that the class-rate structure from Illinois to the Southwest, representative of the movement here considered, is 107 per cent of that in western trunk-line territory zone II, representative of the movement in the case last cited.

Reasonable Future Rate Basis from Southern Illinois

A basis of reasonable group rates for the future from southern Illinois to the general destination territory covered by the consolidated cases is set forth in appendix B. These rates are on a generally higher level than those prescribed in the former reports, but are lower than the rates proposed by defendants and lower than those in effect prior to the issuance of the former reports. There are only three or four small mines on the Louisville & Nashville in southern Illinois, from which the production of about six carloads per day moves to St. Louis. The Mississippi River crossings of that line are at St. Louis and Memphis, and its routes from southern Illinois via those gateways to the destination territory considered are very circuitous. The Louisville & [fol. 91] Nashville will not be required to establish joint rates from mines on its line in southern Illinois to the destination territory considered.

The rates to some of the points in the lower portion of southern Arkansas are comparatively low. Considering the measure of the earnings under the present rate groupings in that destination territory, as previously outlined, and the fact that the evidence is not such as to condemn those groupings from the standpoint of transportation conditions, carrier competition, or justice to individual destinations, it is not apparent, upon this record, that changes should be required in the rate adjustment to that territory. Some of the destination rate groups in that territory are large, but the evidence does not show that they are unreasonably so, considering the total length of the hauls and the circuity of some of the routes. For the reasons outlined above, destinations in certain portions of southern Arkansas south of

Helena, Little Rock, and Bests, brought in issue in no. 24908, are not included in the group adjustment herein found reasonable.

The record shows that the rates to some of the destinations are lower on fine or slack coal than on lump coal. Carriers are at liberty to establish rates less than reasonable maxima, and lower than we can prescribe, provided they are not unduly prejudicial or unduly burdensome upon other traffic, but we find no reason upon this record for prescribing rates on fine or slack coal lower than on run-of-mine or lump coal. Midwest Coal Traffic case.

[fol. 92] Rates From Western Kentucky

In West Kentucky Coal Bureau v. I. C. R. R. Co., 62 I. C. C. 686, division 2 considered the relationship of coal rates from southern Illinois and western Kentucky to destinations west of the Mississippi River on and east of the line of the Frisco from Festus, Mo., via Cape Girardeau, Brownwood, and Poplar Bluff, Mo., and Hoxie and Jonesboro, Ark., to Marion, Ark. The difference in the average distances to that territory, as between these two origin groups, corresponds substantially with the difference in the average distances from the same groups to Mattoon and Decatur, Ill., and points beyond, to which a differential of 25 cents, western Kentucky over southern Illinois, had been established pursuant to the findings in Ohio Valley Coal Operators' Asso. v. I. C. R. R. Co., 53 I. C. C. 148. In the West Kentucky Coal Bureau case, rates from western Kentucky were found unduly prejudicial to the extent that they exceeded corresponding rates from southern Illinois mines by more than 25 cents. The differential to Mattoon and beyond was increased subsequently to 35 cents. Illinois-Indiana Coal Cases, 128 I. C. C. 265.

In the West Kentucky Coal Bureau case the difference in the average distances from the two origin groups via Thebes was stated as 77.2 miles, computed by using the total distances to the designations, but as computed by defendants and an intervener the difference was 86.5 miles. This difference in distance is in the movements up to Thebes. Exhibits introduced by defendants at the consolidated hearing herein show that the average distance to Thebes from 104 mines in southern Illinois is 81.1 miles, and from 39 mines on [fol. 93] the Illinois Central in western Kentucky, 163.4

miles, a difference of 82.3 miles. The Mississippi River crossings used in connection with through westbound routes of the Louisville & Nashville and its connections are at St. Louis and Memphis. There are no joint through rates via Thebes from western Kentucky mines on the line of that defendant. Routing from those mines via Thebes would afford only short hauls to that defendant from the mines to interchange points within the origin group. The record does not justify the requirement that joint rates be established from western Kentucky mines on that line via Thebes.

The western Kentucky differential of 25 cents does not apply to all points in southeastern Missouri. For example, to Dudley the western Kentucky rate is only 1 cent higher, and to Bismarck and Bonne Terre 39 cents higher, than corresponding rates from southern Illinois. But the differential of 25 cents is now generally in effect from Illinois Central mines in western Kentucky to southeastern Missouri, and from mines on both originating lines in western Kentucky to that portion of Arkansas north of an east-and-west line through Memphis. To certain stations in Arkansas, including Little Rock, Brinkley, Bald Knob, and Jelks, the western Kentucky rates are 38 cents under those from southern Illinois. This situation resulted from the reduction of the rate from western Kentucky to Little Rock under the finding in Evans v. Illinois C. R. Co., 155 I. C. C. 701, and from voluntary reductions in the rates to stations between Little Rock and the Memphis crossings to avoid fourth-section violations. The rate from southern Illinois to Little [fol. 94] Rock was not in issue in the Evans case, and no reductions were made in such rate or in the rates to intermediate points. To most of the other destinations on and south of the above-mentioned line the rates from both origin groups are the same.

A witness for a coal company in western Kentucky testified that in the territory north of the line referred to in the preceding paragraph, that company has had what it considers a fair share of the coal tonnage; but that its tonnage south of such line has not been satisfactory, due, apart from the competition of natural gas, oil, and electricity, to the fact that the western Kentucky mines compete with those in Alabama to a greater degree than is the case farther north. It is pertinent to note that a table introduced by complainant in no. 24908, covering the 1931-32 heating season, shows a total of 685 carloads of western Kentucky coal and 139

carloads of southern Illinois coal shipped to 16 points in Arkasas, to 4 of which, Marianna, Forrest City, Brinkley, and Searcy, all south of the line mentioned, the shipments totaled 100 from western Kentucky and 3 from southern Illinois.

The western Kentucky producers expressed the view that in the future they will have difficulty in meeting the competition of the southern Illinois mines, even under the present differential of 25 cents which applies to a large part of the destination territory. That fear is based largely upon negotiations between producers and miners in the southern Illinois group, pending at the time of the further hearing, looking to the establishment of a lower wage scale in that group than has applied heretofore. Illustrations are shown [fol. 95] of extensive competition afforded by truck transportation and by the growing use of natural gas, oil, wood, and electricity, but that competition is not peculiar to the coal from any particular group.

Coal moves from the western Kentucky group over the lines of the Illinois Central and Louisville & Nashville. The line of the Frisco from Memphis to Hoxie seems to be used generally as a division line for movement through the two gateways from Illinois Central mines in western Kentucky. The Memphis gateway is used to points on and south of that line and the Thebes gateway to points north thereof. The Louisville & Nashville uses only the Memphis gateway on shipments from Western Kentucky to this destination territory.

The defense of the Louisville & Nashville is, to some extent, separate from that of the carriers using the Thebes gateway. It points out that in no 16323 stress was laid upon the fact that rates via Thebes to destinations south of Chaffee were on a higher level than those north thereof. It urges that its route to southeastern Missouri and Arkansas is via Memphis; that it has no part in the making of the rates via Thebes, and does not participate in them; and that the rates from mines on its line should not be measured by the rates via Thebes. The distances via Memphis increase from south to north, while those via Thebes to stations south of Chaffee increase from north to south.

The ton-mile earnings under the prior rates from Illinois Central mines in western Kentucky to Poplar Bluff and [fol. 96] Caruthersville, Mo., and Jonesboro, Brinkley, and Little Rock, Ark., representative of the destination terri-

tory, ranged from 7.7 mills to Little Rock to 11.3 mills to Poplar Bluff. Earnings under the present rates range from 6.9 mills to Little Rock to 9.3 mills to Poplar Bluff. The rate on coal from western Kentucky mines to Memphis is $2, applicable over either the Illinois Central or the Louisville & Nashville. The average distances over those routes are 267 and 276 miles, respectively, for which distances the $2 rate yields 7.4 and 7.2 mills per-ton-mile. The low level of the Memphis rate, which is not here in issue, results from carrier, market, and river, competition. East of Memphis, rates approximating the Memphis rate are in effect from western Kentucky origins to stations considerably less distant; for example, $1.97 to Pierce, Tenn., 118 miles northeast of Memphis.

The assailed rates from western Kentucky mines via Thebes and Memphis were not and are not unreasonable, but there is undue prejudice as between those rates and the rates from southern Illinois mines. Because of the variance in the distances via the two gateways, it is difficult to remove undue prejudice in the rates via Thebes without creating prejudice in the rates via Memphis. The average of the distances over the Frisco and Missouri Pacific routes via Thebes from southern Illinois mines to West Memphis, near the western end of the Memphis bridge, is 267.5 miles. West Memphis and Bridge Junction are practically one point, and will be referred to herein as West Memphis. Using 267.5 miles as the distance from southern Illinois mines, via Thebes to West Memphis, the distance from western Ken- [fol. 97] tucky mines via Thebes to West Memphis is 82.3 miles greater, or 349.8 miles. The average of the distances from Illinois Central and Louisville & Nashville mines in western Kentucky via Memphis to West Memphis is 271.5 miles. The distances from southern Illinois mines via Thebes and from western Kentucky mines via Memphis to Arkansas points near the Memphis crossing are therefore almost on a parity, and considerably less than the distances from western Kentucky to the same destinations via Thebes. On the other hand, to the territory north and west of a line drawn through Joiner, Tulot, Rio Vista, and Griffithville, Ark., and via a point just west of Little Rock, the distances from western Kentucky mines via Thebes are less than those from the same origin group via Memphis, but are 82.3 miles greater than those from southern Illinois via Thebes.

We are of the opinion that a differential of 25 cents, west-

ern Kentucky via Thebes over southern Illinois, will afford a nonprejudicial basis of rates to all of the destination territory considered. To the destination territory on and north of the line of the Missouri Pacific extending from West Memphis to Bald Knob, Ark., nonprejudicial rates from western Kentucky via Memphis will be made by adding to the rate of $2.65 herein prescribed from southern Illinois to West Memphis, a differential of 5 cents per net ton for each 25 miles, or major fraction thereof, of excess distances, western Kentucky via Memphis over southern Illinois, to be applied as outlined in the findings herein. To avoid certain fourth-section violations resulting from the use of the short [fol. 98] routes in applying the differentials, rates no higher than to Jonesboro and Nettleton, Ark., should be established from western Kentucky via Memphis to stations on the Cotton Belt between Jonesboro and Fair Oaks, Ark., and on the Missouri Pacific between Nettleton and Wynne, Ark. Under the foregoing differential basis, the lowest rates from western Kentucky will apply via Thebes to the destination territory as far south as Bassett, Caraway, Nettleton, Jonesboro, Bono, Hoxie, and Black Rock, Ark. With few exceptions, the lowest rates to destinations south thereof will apply via Memphis. This will be substantially in accordance with the present method of routing via the two gateways.

The situation north of the line of the Missouri Pacific extending west from West Memphis is complicated by the fact that some of the movements via Memphis are principally to the north, and the movements via Thebes, to points south of Chaffee, are to the south. The nearest approach to that situation in the territory south of that line is as to destinations on the Rock Island branches extending from Brinkley to Newport and from Mesa to Searcy, as previously outlined. Otherwise the movements via both gateways are toward the south or southwest.

Toward the eastern portion of the destination territory southwest of Memphis the differences in the distances, western Kentucky via Memphis in excess of those from southern Illinois, are not as great as in the western portion. For example, in the eastern portion, the distances from western Kentucky via Memphis to Marianna and Monticello, Ark., are only 32.7 miles in each instance in excess of those from [fol. 99] southern Illinois, while in the western portion the differences in distances to Pine Bluff and Little Rock, over the short tariff routes, are 51.9 and 66.5 miles, respectively.

To destinations south of the line of the Missouri Pacific, last mentioned, nonprejudicial rates will be made by the addition of a distance differential similar to that herein prescribed to points on and north of that line, except that the differential should be added to the rates herein prescribed from southern Illinois to such destinations, instead of to the West Memphis rate of $2.65. As an alternative, defendants may establish substantially the same grouping of the rates from western Kentucky mines via Memphis as is prescribed herein from southern Illinois to the same destinations, as outlined in the findings herein.

The differential basis herein prescribed as between the rates from western Kentucky via Memphis and from southern Illinois should apply from western Kentucky mines on the Louisville & Nashville as well as from those on the Illinois Central. Under the bases prescribed, the rate from both of the origin groups to West Memphis will be $2.65. That rate will yield 9.3 mills per ton-mile from Louisville & Nashville mines, an average of 286 miles.

Rates From Alabama

The reasonableness of the rates from Alabama mines is also assailed. In several of the reopened cases, and also in no. 24908, undue prejudice to southern Illinois mines and undue preference of mines in Alabama is alleged. The Alabama Mining Institute intervened in opposition to any find-
[fol. 100] ing of undue preference which might be made with respect to the rates from mines in that State. In northeastern Arkansas and in southeastern Missouri near Caruthersville there is keen market competition as to coal from Alabama and that from southern Illinois and western Kentucky, and there is similar competition throughout most of the destination territory. In portions of northeastern Arkansas competition from coal originating northwest of Little Rock is also felt.

In Alabama Mining Institute v. I. C. R. R. Co., 109 I. C. C. 740, and Coal from Illinois, Kentucky, and Alabama, 128 I. C. C. 113, hereinafter referred to as no. 16505 and I. and S. 2814, respectively, division 2 found that the existing relationship of rates to destinations in certain States, including Arkansas, was unduly preferential of mines in southern Illinois and western Kentucky and unduly prejudicial to those in Alabama. To correct that situation the

division prescribed a differential of 5 cents per net ton from base groups in the Alabama district under the rates from the Illinois-western Kentucky districts for each 25 miles, or major fraction thereof, beginning with a difference in distance of 25 miles, by which the average distances from the Illinois Central mines in the Illinois-western Kentucky districts exceed the average distances from Frisco group 2 mines and Southern Railway groups 4, 11, and 12 mines in Alabama. Those findings included destinations throughout Arkansas, but the rates established by the carriers as a result of the conferences mentioned in I. and S. 2814 were confined to stations on and south of a line extending, [fol. 101] roughly, through Earle, Brinkley, Pine Bluff, and Stamps, Ark., and through a point just south of Texarkana, Ark., which line is described as the equidistant line as to the southern Illinois and Alabama origin groups.

When no. 16505 was decided, rates from western Kentucky and southern Illinois were identical to practically every destination therein considered. For that reason the distance differential was made to apply as to both of those groups. The relationship of the rates from southern Illinois and Western Kentucky was not there in issue. Under the findings herein there will be differences in the rates from those two groups. For that reason the rates from Alabama mines should be based on a differential relationship as between those mines and the mines in southern Illinois, instead of those in southern Illinois-western Kentucky. The rate adjustment in No. 16505 and I. and S. 2814 covers a large portion of the destination territory here considered, and, as here modified, should be continued. Under the findings herein the same adjustment will apply up to but not on the line of the Missouri Pacific from West Memphis to Bald Knob, Ark., and a somewhat different adjustment on and north of that line.

The destination territory on and north of the line of the Missouri Pacific mentioned above presents difficulty in applying differentials from Alabama similar to that on movements from western Kentucky via Memphis, in that the movements are toward the lower rated destinations from southern Illinois via Thebes. As to that territory the rate of $2.65 herein prescribed from southern Illinois to West Memphis should be used as a basis for the differentials, [fol. 102] the same as on shipments from western Kentucky via Memphis to that territory.

In its exceptions the Frisco expressed the view that to destinations in southeastern Missouri and northeastern Arkansas, in the territory to which the next preceding paragraph relates, rates from Alabama mines should be based on differentials added to the rates from southern Illinois to the same stations, and that appropriate fourth-section relief should be granted. We do not agree with that view. After leaving the Memphis crossing, the general direction of the Alabama movement is toward the Thebes crossing, and through groups to which rates from southern Illinois will be successively less as the Thebes crossing is approached. For example, the group rate herein prescribed from southern Illinois to stations near the Memphis crossing is $2.65, and to Oran and other stations near the Thebes crossing, $1.65. The differentials should be added to the rate of $2.65.

The Alabama Mining Institute excepts to the statement in the proposed report that the differentials from Alabama mines should be based on the average distance from Frisco group 2 and Southern Railway groups 4, 11, and 12. It points out that Frisco group 3 and Southern Railway group 13 are the nearest groups to the destination territory, and urge that the distances from those groups should be included. The evidence does not warrant a finding in that respect different from that in no. 16505, in which distances were computed from Frisco group 2 and Southern Railway groups 4, 11, and 12. It is not shown why distances from [fol. 103] the additional groups mentioned by this intervener should be included any more than those, for example, from Southern Railway groups 2 and 5, the most distant of the Alabama groups from Memphis.

Reparation

In connection with the level of the future rates, as well as upon the question of reparation, defendants introduced evidence relating to their net earnings for the past several years. For example, the Cotton Belt dropped from net earnings of $2,405,539 in 1926 to annual deficits since 1929. The Frisco's rate of return on the book value of its railroad properties are shown to have ranged from 5.62 per cent in 1926 to 2.04 per cent in 1931, and 0.35 per cent for January to April, inclusive, 1932. The Missouri Pacific's returns, upon a similar basis, were 3.53 per cent in 1927, 2.95 per

cent in 1931, and 0.41 per cent for January to April, inclusive, 1932. Lack of adequate revenue from operations as a whole affords no reliable measure of the reasonableness of the rates on coal or other individual commodities. It is not shown to what extent the low returns mentioned by defendants are influenced by the coal rates here considered.

Complainants contend that rates charged on coal to particular points in excess of corresponding rates prescribed in no. 16323 were and are unlawful. They refer to the fact that all of the reparation awarded in that case and a portion of that awarded in the East St. Louis Cotton Oil case has been paid, and cite Phillips v. Grand Trunk Ry., 236 U. S. 662, in support of their contention that like payment [fol. 104] must be made to others who paid freight charges on the same basis. Section 16a of the Interstate Commerce Act provides that after we have made any decision, order, or requirement, any party thereto may make application for "rehearing of the same," and that if such a rehearing is granted and thereafter it shall appear that the original decision, order, or requirement was in any respect unjust or unwarranted, we may "reverse, change, or modify the same" accordingly.

Defendants emphasize that the rates in effect prior to the reductions resulting from the previous findings in no. 16323 and related cases were equal to or lower than rates found justified on like traffic in I. & S. 555, 1915 Western Rate Advance Case, 35 I. C. C. 497, and in Ex parte 57, The Fifteen Per Cent Case, 45 I. C. C. 303, as modified by the subsequent general increases and reduction. They urge that the findings in those cases, coupled with the subsequent general increases and reduction, were equivalent to approval of the rates in effect prior to the decision in no. 16323, and that, therefore, by reason of the decision in Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370, we are without power to award reparation on shipments moved at those rates.

In 1915 the carriers in western trunk-line, trans-Missouri, and southwestern territories sought to apply increased rates on certain commodities, including coal, which they claimed were not bearing their equitable share of transportation costs. In I. & S. 555 it was found that the proposed increased rates on coal to the territory here considered had been justified. In Ex parte 57, decided in 1917, we stated [fol. 105] that a general increase in the rates of the western

carriers was not justified, but we authorized those carriers to increase their coal and coke rates, not to exceed 15 cents per ton. Complainants contend that as the findings in the two cases relied upon by defendants were merely permissive they cannot be construed as an approval of the increased rates in such sense as to make applicable the doctrine set forth in the Arizona Grocery case. In this connection they cite Eagle Cotton Oil Co. v. Southern Ry. Co., 51 Fed. (2d) 443, in which it was held that our orders authorizing general revisions or adjustments of rates are not to be construed as approving or prescribing particular rates. The Supreme Court denied a writ of certiorari in that case.

The situation here presented is akin to that in Coal Trade Assn. v. Baltimore & O. R. Co., 185 I. C. C. 225, 190 I. C. C. 743. In the original report in that proceeding division 4 dismissed the complaints as to reparation on the ground that the rates assailed were among those found justified in Indiana and Illinois Coal, 40 I. C. C. 603, and cited the Arizona Grocery case as authority for its finding. Upon further consideration the division concluded that neither the Arizona Grocery case nor the Eagle Cotton Oil case was controlling. It pointed out that the rate adjustment therein considered had been maintained on the basis approved in 1916, without changes except for the subsequent general increases and reduction, and stated that under the circumstances defendants were justified in assuming that they were maintaining reasonable rates. The division quoted from [fol. 106] Eastern Live Stock Cases of 1926, 144 I. C. C. 731, 781, as follows:

When we are of the opinion that rates have become unreasonable as the result of changes in conditions so gradual that no date can be pointed out upon which they became unreasonable, and the history of the rates is such as to justify the carriers in believing that they were maintaining rates which had our approval, we have the power to fix the reasonable rates for the future, and, in that "flexible limit of judgment which belongs to the power to fix rates" to refuse to hold the rates unreasonable in the past.

The principles set forth in the report on reconsideration in the Coal Trade Assn. case is applicable here. We have prescribed a basis of maximum reasonable group rates from southern Illinois origins which will result in much better alignment than now in effect and have also fixed from west-

ern Kentucky and Alabama mines, by means of differentials, rate bases which will better align the rates from those groups individually and provide more equitable relationships as between the three origin groups. The prescribed rates are lower than those in effect prior to the findings in no. 16323, higher as a whole than those prescribed in that case and related proceedings, and lower than those which defendants proposed as reasonable. The fact should not be overlooked that since the changes in the rates under the previous findings in the reopened cases shippers and consignees have received the benefit of rates to many of the points on a lower level than that which we herein find reasonable. To [fol. 107] that extent the situation presents a general rate readjustment, with many increases but few reductions.

Complainants point out that I. and S. 555 and Ex parte 57 were decided prior to the effective date of the Transportation Act, 1920, and urge that in any event our orders at that time did not extend beyond a period of two years. But it is shown that the rates in effect prior to the reductions made under the findings in no. 16323, and related cases, resulted, with comparatively few exceptions, from the increased rates approved in 1915 and 1917. Those exceptions are stated by defendants to have been in the form of reductions in rates. Condemnation of rates charged in the past on the traffic here considered would be equivalent to penalizing defendants for doing what we have told them previously they might do. The circumstances are not such as to justify an award of reparation.

Findings

Upon reconsideration of the cases previously reported, and consideration of the other cases included herein, we find:

1. That the assailed rates from mines in the southern Illinois origin group and subgroups thereof, and in the Belleville origin group, which groups are as defined in defendants' tariffs, and will be hereinafter referred to, collectively, as the southern Illinois group, to the destinations covered by the complaints are and for the future will be unreasonable, as to shipments moving via the Thebes gateway, to the extent that they exceed or may exceed the corresponding rates set forth in appendix B hereto; except [fol. 108] that this finding is not to apply to rates from mines on the Louisville & Nashville.

2. That the assailed present relationship between the rates from the southern Illinois group, as described in finding numbered 1, and those from mines on the Illinois Central in western Kentucky, on shipments moving via Thebes to the destination territory covered by the complaints, including the additional territory brought in issue by no. 24908, modified as shown in the footnote to appendix A hereto, is and will be unduly prejudicial. Such prejudice shall be removed by the establishment of rates from mines on the Illinois Central in western Kentucky, via Thebes, not exceeding 25 cents per net ton over those herein prescribed from mines in the southern Illinois group to the same destinations.

3. That the assailed present relationship between the rates from the southern Illinois group, as described in finding numbered 1, and those from mines on the Illinois Central and Louisville & Nashville in western Kentucky, on shipments moving via Memphis, is and will be unduly prejudicial. To destinations on and north of the line of the Missouri Pacific from West Memphis via Wynne and Fair Oaks to Bald Knob, Ark., such prejudice shall be removed by establishing, from the western Kentucky group via Memphis, rates not exceeding those based on $2.65 as herein prescribed from the southern Illinois group to West Memphis, plus a differential of 5 cents per net ton for each 25 miles, or major fraction thereof, beginning with a difference in distance of 25 miles, of excess distances, western Kentucky [fol. 109] via Memphis over southern Illinois via Thebes; except that rates from western Kentucky via Memphis to stations on the Cotton Belt between Jonesboro and Fair Oaks, Ark., and on the Missouri Pacific between Nettleton and Wynne, Ark., shall not exceed the rates from western Kentucky via Memphis to Jonesboro and Nettleton, respectively. To destinations south and southwest of the line of the Missouri Pacific from West Memphis to Bald Knob the undue prejudice shall be removed by the establishment, from the western Kentucky group via Memphis, of rates not exceeding those computed under the differential basis set forth above in this finding, except that as to those destinations the differentials are to be added to the rates herein prescribed thereto from southern Illinois, instead of to the West Memphis rate of $2.65.

4. That the assailed present relationship between the rates on coal, in carloads, from mines in the Alabama base groups hereinafter mentioned, on the one hand, and from mines in the southern Illinois and western Kentucky groups, on the other, is and will be unduly prejudicial. Such prejudice shall be removed by the establishment of rates from the Alabama base groups which shall not exceed those made by means of a differential of 5 cents per net ton for each 25 miles, or major fraction thereof, beginning with a difference in distance of 25 miles, of differences in the average distances from mines in the southern Illinois group, via Thebes, and from Frisco group 2 and Southern Railway groups 4, 11, and 12 in Alabama; to destinations on the north of the line of the Missouri Pacific from West Memphis to Bald [fol. 110] Knob, such differential shall be added to or deducted from the rate of $2.65 prescribed herein from mines in the southern Illinois group to West Memphis, according as the distances from such mines, via Thebes, or from such Alabama base groups, via Memphis, are greater, except that the rates from Alabama mines to stations on the Cotton Belt between Jonesboro and Fair Oaks, Ark., and on the Missouri Pacific between Nettleton and Wynne, Ark., shall not exceed the rates from the Alabama mines to Jonesboro and Nettleton, respectively; to destinations south and southwest of such line of the Missouri Pacific from West Memphis to Bald Knob, the differential shall be added to or deducted from the rates prescribed herein from mines in the southern Illinois group to such destinations, according as the distances from such southern Illinois mines via Thebes or from such Alabama origin groups via Memphis are greater. The evidence does not warrant any change in the present relationship between the Alabama base groups and other groups in Alabama.

5. That except as above, the assailed rates were not and are not unreasonable or unduly prejudicial. Reparation is denied.

6. That defendants may establish, as an alternative, the same grouping from western Kentucky via Memphis and from Alabama as will apply from the southern Illinois group under the foregoing findings, in lieu of rates to individual destinations, except that, under such alternative grouping, the groups to which rates of $2.15, $2.30, and $2.40 are herein prescribed from the southern Illinois group shall each

[fol. 111] be divided into two groups as to rates from western Kentucky via Memphis and from Alabama; such subdivided groups to include (1) stations on and east of the line of the Cotton Belt extending through Jonesboro, Paragould, Rector, and St. Francis, Ark., and (2) stations west of that line. In such event, the distances upon which the differentials provided for in findings numbered 3 and 4 are to be based shall be the averages of the distances from the origin groups to stations in the destination groups subdivided as above.

The distances referred to in findings numbered 3, 4, and 6 are to be computed over the shortest routes, via Thebes or Memphis as the case may be, over which carload traffic can be moved without transfer of lading. The present authorized emergency increases may be added to the rates under the prescribed bases. It is to be understood, however, that the prescribed relationships between the respective origin groups are to be maintained.

The findings in the former reports, to the extent that they are inconsistent with those herein, are reversed. Orders entered pursuant thereto will be vacated. An order for the future will be entered.

McManamy, Commissioner, dissenting:

It is my view that the rates prescribed by the majority are not justified by the evidence of record in this case. They not only exceed rates previously prescribed in these cases but materially exceed rates prescribed by us on coal between points in the same general territory.

Compared with the Holmes & Hallowell scale the rates [fol. 112] prescribed by the majority vary from 101 to 107 per cent of that scale. The rates prescribed in the previous reports in these cases in some instances were but 87 per cent of the scale. In Illinois Coal Traffic Bureau v. Arkansas Valley I. Ry. Co., 161 I. C. C. 337, we prescribed rates on coal from southern Illinois to points in Missouri that were 88 per cent of the Holmes & Hallowell scale while in Midwest Coal Traffic Bureau v. Arkansas Valley I. Ry. Co., 173 I. C. C. 467, we prescribed rates on coal from mines in Arkansas, Missouri, Oklahoma, and Kansas to points in Nebraska and Kansas which reflected about 90 per cent of the Holmes & Hallowell scale. I do not find anything in

this record to justify rates reflecting a level so much higher than those fixed in the cases cited.

The prescribed adjustment is in conflict with our decisions in Alabama Mining Institute v. I. C. C. Co., 109 I. C. C. 740, and Coal from Illinois, Kentucky, and Alabama, 128 I. C. C. 113. On this record the rates should be found unreasonable to the extent that they exceeded 90 per cent of the Holmes & Hallowell scale.

I am authorized to state that Commissioner Brainerd joins in this dissenting expression.

Chairman Farrell and Commissioner Porter dissent. Commissioners Eastman and Miller did not participate in the disposition of these cases.

[fol. 113] EXHIBIT No. 11

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 3rd day of July, A. D. 1933.

No. 16323

THE SCOTT COUNTY MILLING COMPANY et al.

v.

BUTLER COUNTY RAILROAD COMPANY, CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, East St. Louis & Suburban Railway Company, Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Marion & Eastern Railroad Company, Missouri-Illinois Railroad Company, Missouri Pacific Railroad Company, Mobile and Ohio Railroad Company, St. Louis & Belleville Electric Railway Company, The St. Louis, Troy and Eastern Railroad Company, The St. Louis and O'Fallon Railway Company, St. Louis and Ohio River Railroad, St. Louis, Kennett & Southeastern Railroad Company, St. Louis-San Francisco Railway Company and J. M. Kurn and John G. Lonsdale, Receivers, St. Louis Merchants Bridge Terminal Railway Company, St. Louis Southwestern Railway Company, Southern Railway Company, Terminal Railroad Association of St. Louis, and The Wabash, Chester and Western Railroad Company and J. Fred Gilster, Receiver.

It appearing, That on July 12, 1926, division 1 made and filed its report and entered its order, and on July 10, 1928,

the commission made and filed its report and entered its [fol. 114] order, in No. 16323 and sub-numbers thereto; on July 22, 1929, division 2 made and filed its report and entered its order in No. 19482; on June 3, 1929, division 3 made and filed its report and entered its order in No. 18496; on January 12, 1931, division 3 made and filed its report and entered its order in No. 21522 and sub-numbers thereto; on December 16, 1930, division 5 made and filed its report and entered its order in No. 22196 and sub-numbers thereto; on October 28, 1930, division 2 made and filed its report in No. 22321 and sub-numbers thereto, and in Nos. 22271 and 22429; on January 20, 1931, division 3 made and filed its report in No. 22507; on March 5, 1931, division 2 made and filed its report in No. 22516; on December 18, 1930, division 2 made and filed its report in No. 22613 and sub-numbers thereto; on April 30, 1931, division 3 made and filed its report in Nos. 23578 and 22768; that the commission issued reparation orders on February 11, March 11, July 8, and August 3, 1929, in No. 16323 and sub-numbers thereto, and on May 12, August 14, November 10, and December 8, 1930, and February 9 and April 13, 1931 in No. 19482; and that thereafter the commission by appropriate orders reopened said proceedings for further hearing;

It further appearing, That such further hearing has been had, and that the commission has, on the date hereof, made and filed a report on further hearing containing its further findings of fact and conclusions thereon, which said report, and the aforesaid reports and orders enumerated in the next preceding paragraph are hereby referred to and made parts hereof;

And it further appearing, that Nos. 21578, 22876, 22945, [fol. 115] 22962, 22986, 23150, 23252, 23384, 23591, 23663, 23718, 23816, 24067, 24505, 24354, 24670, 24908, 25203, and 25018, and sub-numbers thereto, being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That said orders entered herein on July 12, 1926, July 10, 1928, February 11, March 11, June 3, July 8 and 22, and August 3, 1929, May 12, August 14, October 28, November 10, and December 8, 16, and 18, 1930, January

12 and 20, February 9, March 5, and April 13 and 30, 1931, be, and they are hereby, vacated and set aside.

It is further ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist on or before October 19, 1933, and thereafter to abstain from publishing, demanding, or collecting for the transportation of coal, in carloads, from and to the points designated in the next five succeeding paragraphs hereof, rates which exceed those prescribed in said paragraphs.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 19, 1933, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate com- [fol. 116] merce act, and thereafter to maintain and apply to the transportation of coal, in carloads, from mines in the southern Illinois origin group and sub-groups thereof, and in the Belleville origin group, as those groups are described in said report, all of which origin groups are referred to hereinafter as the southern Illinois group, to destinations in Missouri and Arkansas, to the extent that the rates between such points are covered by the findings in said report, as to shipments moving via Thebes, Ill., rates which shall not exceed those under the bases set forth in Appendix B to said report; except that this paragraph shall not apply to rates from mines on the lines of the Louisville and Nashville Railroad Company.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 19, 1933, upon notice as aforesaid, and thereafter to maintain and apply to the transportation of coal, in carloads, from mines on the lines of the Illinois Central Railroad Company in western Kentucky, via Thebes, Ill., to the destination territory covered by the findings in said report, rates which shall not exceed by more than 25 cents per net ton the rates prescribed herein from mines in the southern Illinois group to the same destinations.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 19, 1933, upon notice as aforesaid, and thereafter to

maintain and apply to the transportation of coal, in carloads, from mines on the lines of the Illinois Central Rail-
[fol. 117] road Company and Louisville and Nashville Railroad Company in western Kentucky, via Memphis, Tenn., to destinations covered by the findings in said report, rates constructed as follows: To destinations on and north of the line of the Missouri Pacific Railroad Company from West Memphis, Ark., via Wynne and Fair Oaks, Ark., to Bald Knob, Ark., not exceeding $2.65 plus a differential of 5 cents per net ton for each 25 miles, or major fraction thereof, beginning with a difference in distance of 25 miles, of excess distances, western Kentucky via Memphis over Southern Illinois via Thebes, except that rates from western Kentucky mines via Memphis to stations on the line of the St. Louis Southwestern Railway Company between Jonesboro and Fair Oaks, Ark., and on the line of the Missouri Pacific Railroad Company between Nettleton and Wynne, Ark., shall not exceed the rates from western Kentucky mines via Memphis to Jonesboro and Nettleton, respectively; and to destinations south and southwest of said line of the Missouri Pacific Railroad Company from West Memphis to Bald Knob, not exceeding the rates prescribed in this order from mines in said southern Illinois group to the respective destinations plus said differential, constructed as aforesaid.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 19, 1933, upon notice as aforesaid, and thereafter to maintain and apply to the transportation of coal, in carloads, from mines in the Alabama base groups, as described in said report, to the destinations covered by the findings in said report, rates constructed as follows: To destinations
[fol. 118] on and north of the aforesaid line of the Missouri Pacific Railroad Company from West Memphis to Bald Knob, not exceeding $2.65 plus or minus a differential of 5 cents per net ton for each 25 miles, or major fraction thereof, beginning with a difference in distance of 25 miles, of differences in the average distances from mines in said southern Illinois group, via Thebes, and from Frisco group 2 and Southern Railway groups 4, 11 and 12 in Alabama, as described in said report, according as the distances from mines in said southern Illinois group, via Thebes, or from said Alabama groups, via Memphis, are greater, except that rates from mines in said Alabama groups to stations on the

line of the St. Louis Southwestern Railway Company between Jonesboro and Fair Oaks, Ark., and on the line of the Missouri Pacific Railroad Company between Nettleton and Wynne, Ark., shall not exceed the rates from said Alabama groups to Jonesboro and Nettleton, respectively; and to destinations south and southwest of said line of the Missouri Pacific Railroad Company from West Memphis to Bald Knob, not exceeding the rates prescribed in this order from mines in said southern Illinois group to the respective destinations plus or minus said differential, constructed as aforesaid, according as the distances from mines in said southern Illinois group via Thebes or from mines in said Alabama groups via Memphis are greater.

It is further ordered, That defendants may establish, as an alternative, the same grouping from western Kentucky mines via Memphis and from Alabama mines as will apply from mines in said southern Illinois group under the findings in said report, in lieu of rates to individual destina-[fol. 119] tions, except that, under such alternative grouping, the groups to which rates of $2.15, $2.30 and $2.40 are herein prescribed from mines in said southern Illinois group shall each be diveded into two groups as to rates from western Kentucky via Memphis and from Alabama; such subdivided groups to include (1) stations on and east of the line of the St. Louis Southwestern Railway Company extending through Jonesboro, Paragould, Rector, and St. Francis, Ark., and (2) stations west of said line. In such event, the distances, from western Kentucky via Memphis and from Frisco group 2 and Southern Railway groups 4, 11 and 12 in Alabama, upon which the differentials provided for herein are to be based, shall be the averages of the distances from the origin groups to stations in the destination groups subdivided as above.

It is further ordered, That the rates prescribed in the next three preceding paragraphs hereof shall be determined in accordance with the distance formula prescribed in the findings in said report. The present authorized emergency increases may be added to the rates under the prescribed bases. It is to be understood, however, that the prescribed relationships between the respective origin groups are to be maintained.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 120] Defendant offers deposition of B. V. Forrester, as follows:

B. V. Forrester, of lawful age, being produced and sworn on the part of defendant, testified as follows:

Direct examination.

By Mr. Finch:

Q. State your name, please.
A. B. V. Forrester.
Q. Where do you live, Mr. Forrester?
A. Sikeston, Missouri.
Q. What is your business?
A. Traffic manager, Scott County Milling Company.
Q. How long have you been connected with the Scott County Milling Company?
A. Nineteen years.
Q. Were you familiar with the proceedings before the Interstate Commerce Commission brought by the Scott County Milling Company in a cause entitled "Scott County Milling Company v. Butler County Railroad et al."?
A. Yes, sir.
Q. After the order of reparation had been issued by the Interstate Commerce Commission, did you have a conference with any of the officers of the Missouri Pacific Railroad Company with regard to said reparation?
A. Yes, sir.
Q. With whom did you have that conference?
A. Mr. Perkins.
Q. Do you know what position Mr. Perkins held with the Missouri Pacific?
A. Vice-president in charge of traffic.
Q. Where was that conference held?
A. In the Railway Exchange Building, Missouri Pacific general office.

Mr. Bailey:

Q. St. Louis, Missouri?
A. St. Louis, Missouri.
[fol. 121] Q. For what purpose did you call on Mr. Perkins?
A. In view of obtaining payment on the reparation ordered by the Commission.

Q. Do you recall about what date you called on Mr. Perkins?

A. Well, I remember it was the first week in April, 1929.

Q. Was anyone with you?

A. M. Q. Tanner.

Q. Where does he live?

A. Webster Groves, Missouri.

Q. Do you recall, at that time was he connected with the Scott County Milling Company?

A. He was, only in a brokerage way—he was a broker.

Q. Wish you would state just what you said to Mr. Perkins and what Mr. Perkins said to you relative to the payment of reparation, as far as you can recall.

A. I asked Mr. Perkins about the payment of the reparation. At the time, the order was near at hand, and Mr. Perkins said that Mr. Larimore had been handling the reparation in this particular case and he wasn't very familiar with it, and then Mr. Perkins asked me what the Frisco had done about it and I told him that Mr. Kurn had agreed, or rather had ordered the reparation paid, and he said, "Well, whatever the Frisco had done, the Missouri Pacific will do likewise."

Q. Who was Mr. Kurn?

A. President of the Frisco Lines.

Q. Now, did you have any further conference with anyone connected with the Missouri Pacific after that time, relative to the payment of reparation as ordered?

A. No, other than I assisted the auditing department in handling Form 5 statement.

Mr. Bailey:

Q. Rule V statement?

[fol. 122] A. Rule V statement, yes. We got together and there was amendments, slight changes.

Q. Did you have any further conference about the payment of reparation?

A. I don't remember of any.

Q. Immediately after the conference with Mr. Perkins, what did the Missouri Pacific do with respect to the payment of reparation?

A. Payments started to come in three or four or five days later.

Cross-examination.

By Mr. Dearmont:

Q. Mr. Forrester, you had previously called upon Mr. Kurn of the Frisco regarding payment of the reparation that had been ordered paid in their case?

A. Yes, sir.

Q. Who was with you when you called upon him?

A. M. Q. Tanner.

Q. And then was the Missouri Pacific—Mr. Perkins—the next railroad you called upon?

A. Yes, the Missouri Pacific was next.

Q. Had you made any written demand upon them previously?

A. No, sir.

Q. And you went there for the purpose of demanding payment of the reparation that was ordered by the Commission?

A. Well, I was seeking reparation; yes, sir.

Q. You say Mr. Perkins told you he wasn't very familiar with the case himself?

A. He said he had lost track of it and Mr. Larimore was more familiar with it than he was.

Q. Was Mr. Larimore president at the time?

A. I don't recall that he was.

Q. And after you told him that the Frisco was going to pay, he said that if the Frisco was going to pay, the Mis- [fol. 123] souri Pacific was going to pay also?

A. He said they would follow the Frisco.

Q. Do you recall just what you said to him?

A. I told him I wanted to discuss the reparation case with him; that there was an order for the reparation to be paid, and the time was fast approaching when this must be paid and we had decided on some action. Of course, we had dropped the matter for seven years.

Q. Did you tell him what you were going to do if they would not pay?

A. Well, that was understood.

Q. What was the understanding?

A. They knew that we had only one recourse if they did not voluntarily pay the reparation.

Q. Did you tell him that you were going to have to institute suit?

A. We didn't make any threats whatsoever.

Q. So far as you know, no one was present but you and Mr. Tanner and Mr. Perkins?

A. Probably his secretary was there.

Q. Later on payments were made by mail, were they?

A. Yes, sir. Oh, I probably picked up two or three in the office, just running in and out.

Q. All of them were paid during April?

A. I am sure they were. I am sure they were paid before the 20th of April.

Defendant offers deposition of L. R. Bowman, as follows:

L. R. BOWMAN, of lawful age, being produced and sworn on the part of defendant, testified as follows:

Direct examination.

By Mr. Finch:

Q. State your name, please.

A. L. R. Bowman.

[fol. 124] Q. Where do you live, Mr. Bowman?

A. Sikeston, Missouri.

Q. What is your business?

A. Vice-president and general manager of the Scott County Milling Company.

Q. How long have you been connected with the Scott County Milling Company?

A. Since 1904.

Q. How long have you been vice-president and general manager?

A. About four or five years. I don't remember the exact date. I was secretary before that time, and of course up to then.

Q. Then you were connected with the company as one of its officers in 1919?

A. Yes.

Q. Nineteen twenty-nine, I meant to say?

A. Yes, that's right.

Q. Do you recall the payment of reparation to the Scott County Milling Company by the Missouri Pacific Railroad Company?

A. Yes, sir.

Q. When the reparation checks were received by the Scott County Milling Company, what did you do, if anything, with respect to those reparations?

A. We spent the money. It was a closed transaction, and we paid our traffic expert his fee.

Q. At the time it was received, then, you considered that it was a closed transaction?

A. Yes.

Q. Did you treat it as such?

A. Yes.

Q. And considering it a closed transaction, you paid your traffic expert his fee, as stipulated in the agreed statement of facts?

A. Yes, sir.

Mr. Finch: You may ask him.

Mr. Dearmont: I don't think I'll ask him.

Mr. Finch: Just one more question.

Q. In 1929, I believe, you were secretary of the defendant [fol. 125] company. Did you perform the same duties then that you do now as vice-president and general manager?

A. Yes, sir.

Q. And were you in fact, at that time, in charge of the management and business of the Scott County Milling Company?

A. Yes, sir.

Thereupon the Court, at the request of the plaintiffs, gave the following declarations of law:

PLAINTIFFS' DECLARATIONS OF LAW GIVEN

I

The Court declares that plaintiffs' right to maintain this suit is not barred by the five-year statute of limitations of the State of Missouri.

II

The Court, sitting as a jury, declares the law to be that this is an action by plaintiffs for money had and received and is not barred by the provisions of paragraph (3), Section 16, United States Code, Title 49, which provides: (a)

that all sections at law by carriers subject to the "Interstate Commerce Act" for recovery of their charges, or any part thereof, for interstate transportation, shall be begun within three years from the time the cause of action accrues, and not after and (f) that a petition for the enforcement of an order of the Interstate Commerce Commission for the payment of money shall be filed in a district court of the United States or a State court within one year from the date of the order, and not after.

[fol. 126] This declaration of law contains the following notation in the handwriting of the Judge:

"Given but not involved in the case."
"Not considered in the case but is ok."

III

The Court declares the law to be that Rule XV (e) of the Rules of Practice of the Interstate Commerce Commission, as follows:

"A petition for rehearing that part of any case relating to reparation must be filed within sixty days after service of the report therein;"

and Rule XV (f) of the Rules of Practice of the Interstate Commerce Commission and set forth in the agreed statement of facts, as follows:

"A second application under paragraph (a) of this rule for a rehearing, reargument, reconsideration, or for the vacation of any order by the same party or parties and upon the same ground as a former petition or application, which has been considered and denied, will not be entertained,"

are not limitations upon the right of the Interstate Commerce Commission to reopen or grant a rehearing, or vacate findings or orders previously entered in any proceeding before the Commission.

This declaration of law contains the following notation in the handwriting of the Judge:

"Merely academic and not involved in the case, and not necessary to pass on it."
"Never considered."

[fol. 127]

IV

The Court, sitting as a jury, declares the law to be that under the provisions of Sections 16 (a) and 17 of United States Code, Title 49, the Interstate Commerce Commission, after a decision, order, or requirement has been made by such Commission in any proceeding before it, may, of its own motion, at any time reopen any such proceeding and grant to any party thereto a rehearing therein or reconsideration thereof; and following such reopening or rehearing may, if in its judgment the facts so warrant, vacate and set aside its decision, order, or requirement theretofore entered by it in any such proceeding.

V

The Court declares the law to be that if the Interstate Commerce Commission, pursuant to the provisions of Section 16, United States Code, Title 49, shall determine that a party complainant is entitled to an award of damage against a carrier by railroad by reason of having been subjected to the payment of unreasonable rates for interstate transportation and shall make an order directing the carrier to pay to the complainant the sum to which the said Commission finds he is entitled on or before a day named, then if such carrier does not comply with such order within the time limit in such order, complainant may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly [fol. 128] the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that any findings and order of the Commission in the case before it holding the rates assailed unreasonable when assessed are, if supported by testimony in the proceeding before the Commission, conclusive and binding on the Court.

This declaration of law contains the following notations in the handwriting of the Judge:

"Given but not a factor in the case."
"O. K. but not a factor in the case."

VIII

The Court declares the law to be that whether a rate assessed by a common carrier by railroad to shipments moving in interstate commerce is reasonable or unreasonable is a question of fact that under the law can be determined only by the Interstate Commerce Commission in a proper proceeding, and that no court of any State and that no court of the United States has jurisdiction, power, or authority in any proceeding to determine that fact.

This declaration of law contains the following notation in the handwriting of the Judge:

"O. K. but not involved in the case."

To which action of the Court in giving said declarations of law with the Court's notations thereon plaintiffs objected and excepted at the time.

[fol. 129] The Court, at the request of the defendant, gave the following declarations of law:

DEFENDANT'S DECLARATIONS OF LAW GIVEN

I-A

The Court declares the law governing this case and determining the rights of plaintiffs to money sued for to be that plaintiffs cannot recover, because there is no showing of any error of fact in the action taken by the Interstate Commerce Commission, and the Court finds that the Commission based its order of 1933 on facts and conditions arising since its orders of 1926 and 1929, and that the Commission took cognizance in its order of 1933 that the reparations had been paid before it set aside its former orders, and that the Commission could not and did not affect the right to the money theretofore paid by its subsequent order in 1933; that

the Commission had jurisdiction to make the order for reparation in 1926 and 1929, and even if it had revised its judgment on the same facts involved in that decision concerning a matter of opinion, the money, having theretofore been paid, could not be recovered back.

A

The Court, sitting as a jury, declares that under the pleadings and the agreed statement of facts and evidence adduced, plaintiffs are not entitled to recover in this action and the decision of the Court must be for the defendant, Scott County Milling Company.

[fol. 130] B

The Court declares the law to be that an action for money had and received, whole of legal origin, is governed by equitable principles and that under the evidence the equities in this case are for the defendant, and that in equity and good conscience the plaintiffs are not entitled to recover, and the finding of the Court is for the defendant.

F

The Court declares the law to be that the payments made by the Missouri Pacific Railroad Company to the defendant, Scott County Milling Company, under the facts disclosed by the agreed statement of facts and the depositions taken and filed in this cause, were voluntary payments made by the railroad company, with full knowledge of all the facts, and that plaintiffs are not entitled to recover for the return thereof.

G

The Court declares the law to be that an order of the Interstate Commerce Commission for the payment of reparation is not a judgment and that said Commission has no power or authority to enforce said order, and that if the carrier does not voluntarily comply with said order the shipper or complainant is required to bring suit within one (1) year in some court of competent jurisdiction, and that if suit is brought in the United States District Court the order of the Commission is merely prima facie evidence of the facts therein stated.

This declaration of law contains the following notation in the handwriting of the Judge:

[fol. 131] "Academic so far as the case is concerned, but is given."

I

The Court declares that plaintiffs cannot sue and recover for any money paid the Scott County Milling Company for which they have been reimbursed by connecting carriers.

To which action of the Court in giving said declarations of law plaintiffs duly objected and excepted at the time.

The plaintiffs requested but the Court refused to give the following declaration of law:

PLAINTIFFS' DECLARATION OF LAW REFUSED

VI

The Court declares that the payment by Missouri Pacific Railroad Company to defendant of the sum of $23,994.33 at various dates between April 4, and April 19, 1929, inclusive, was in obedience to the terms of an order then in full force and effect made by the Interstate Commerce Commission in the exercise of its lawful duty on the 11th day of March, 1929, in case No. 16,323, and companion cases, and that said payments so made by Missouri Pacific Railroad Company to defendant were not voluntary payments.

The said Interstate Commerce Commission having on the 3rd day of July, 1933, in the exercise of its lawful power set aside, vacated and held for naught its said orders en-[fol. 132] tered on the 11th day of March, 1929, and all other orders theretofore entered in said case No. 16,323, requiring the Missouri Pacific Railroad Company to pay said sum to defendant, the plaintiffs herein are entitled to recover from defendant the amount so paid defendant in obedience to said order of March 11, 1929, which was vacated as aforesaid, with interest thereon at the rate of 6 per cent per annum from the date of the demand for repayment of said amount until paid.

To which action of the Court in refusing to give said declaration of law plaintiffs duly objected and excepted at the time.

Thereafter, to wit, on the 20th day of March, 1936, being the regular March Term, the Court, being fully advised in the premises, found the issues in favor of the defendant and against the plaintiffs, as shown by entry of record made at the time, as follows:

FINDING AND JUDGMENT BY THE COURT

Now, again on this day, come the parties herein by their respective attorneys, and this cause having heretofore been submitted to the Court and by the Court taken under advisement, and the Court now being sufficiently advised of and concerning the premises does find the issues herein in favor of the defendant and against the plaintiffs, and the Court does find the plaintiffs should take nothing by reason of this action.

It Is Therefore, Considered, Ordered and Adjudged by [fol. 133] the Court, That said plaintiffs, L. W. Baldwin and Guy A. Thompson, Trustees of the Missouri Pacific Railroad Company, a corporation, take nothing from the said defendant; Scott County Milling Company, a corporation, and that the said defendant have and recover of and from the said plaintiffs its costs and charges in this cause paid out and expended and have therefor execution.

To which action of the Court in entering said judgment and making said finding the plaintiffs then and there objected and excepted at the time.

Thereupon, at the same term of court and on the 21st day of March, 1936, and within four days after the judgment, plaintiffs filed their motion for new trial, as shown by entry of record made at the time, which said motion for new trial (omitting caption), is as follows:

MOTION FOR NEW TRIAL

Now, at this time comes L. W. Baldwin and Guy A. Thompson, as Trustees of the Missouri Pacific Railroad Company, a corporation, and move the Court to set aside its verdict, findings and judgment in the above-entitled cause

and grant them a new trial therein, for the following reasons:

1. The verdict, findings and judgment of the Court is against the evidence, against the weight of the evidence and against the law under the evidence.

2. The verdict, findings and judgment of the Court was for the wrong party.

[fol. 134] 3. The Court erred in admitting incompetent, irrelevant and immaterial evidence offered on behalf of defendant.

4. The Court erred in rejecting competent, relevant and material evidence offered on behalf of plaintiffs.

5. The Court erred in giving instruction No. 2, requested by plaintiffs, with the following notation:

"Given, but not involved in the case."
"Not considered in the case, but is o. k."

6. The Court erred in refusing instruction No. 3, requestion by plaintiffs. The Court made the following notation on said instruction:

"Merely academic, not involved in the case, and not necessary to pass on it."
"Never considered."

7. The Court erred in giving instruction No. 5, requested by plaintiff, with the following notation:

"Given, but not a factor in the case."

8. The Court erred in refusing instruction No. 7, requested by plaintiffs.

9. The Court erred in giving instruction No. 8, requested by plaintiffs with the following notation:

"Given, but not involved in the case."

10. The Court erred in giving instructions numbered 1-A, A, B, F and I, requested by defendant.

11. Under the law and the facts in this case, the findings and judgment of the Court should have been for plaintiffs,

[fol. 135] and the Court erred in refusing to make such findings and entering such judgment.

12. The opinion of the Court discloses on its face that the Court misconceived the facts and law in the case, and that it erred in its findings and judgment for defendants.

Wherefore, plaintiffs pray the Court to sustain their motion for new trial.

H. H. Larimore, Dearmont, Spradling & Dalton, Attorneys for Plaintiffs.

Endorsed: Filed Mar. 21, 1936. L. J. Pfefferkorn, Circuit Clerk.

MOTION FOR NEW TRIAL OVERRULED

Thereafter, at the same term of court and on the 8th day of April, 1936, the said motion for new trial so filed by plaintiffs coming on to be heard, the same was by the Court by an order duly entered of record, overruled; and to which action of the Court in overruling same, plaintiffs duly objected and excepted at the time.

Thereafter, at the same term and on the same day, to wit, the 8th day of April, 1936, the plaintiffs filed their application and affidavit for an appeal, the same being in the usual and ordinary form (caption omitted), to wit:

[fol. 136] AFFIDAVIT AND APPLICATION FOR AN APPEAL

Now, at this time comes Guy A. Thompson and L. W. Baldwin, Trustees of the Missouri Pacific Railroad Company, the plaintiffs in the above-entitled cause, and pray the Court to grant them an appeal from the verdict and judgment rendered in this cause to the Supreme Court of the State of Missouri, and herewith deposit the sum of $10.00, the docket fee required by law to be deposited on making application for an appeal.

In support of this application for an appeal, A. M. Spradling, for and on behalf of the plaintiffs, makes oath and says that he is the agent and attorney for plaintiffs and that this application for an appeal is not made for vexation or delay, but because affiant believes that the appellants (who are the

plaintiffs in this cause) are aggrieved by the judgment and decision of this Court.

A. M. Spradling.

Subscribed and sworn to before me, this 8th day of April, 1936. L. J. Pfefferkorn, Circuit Clerk. (Seal.)

APPEAL GRANTED

Said application and affidavit being found sufficient, the Court on said date granted an appeal herein to the Supreme Court of Missouri, and granted plaintiffs time within which to file their bill of exceptions.

[fol. 137] BILL OF EXCEPTIONS FILED

And now that the above matters and things, rulings and exceptions may be made a part of the record, the plaintiffs tender to the undersigned, Honorable Frank Kelly, Judge of the Circuit Court of Scott County, Missouri, this their bill of exceptions, and pray that the same may be signed and sealed by said Judge, ordered filed, filed and made a part of the record in said cause, and the same is hereby accordingly done this 2nd day of December, 1937.

Frank Kelly, Judge of the Circuit Court of Scott County, Missouri.

O. K.: Bailey & Bailey, Finch & Finch, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 138] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OF SUBMISSION—January 17, 1938

Come now the parties, by their respective attorneys, and after arguments herein, submit this cause to the Court.

IN SUPREME COURT OF MISSOURI

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of the Missouri Pacific Railroad Company, a Corporation, Appellants,

vs.

SCOTT COUNTY MILLING COMPANY, a Corporation, Respondent

Appeal from the Circuit Court of Scott County

JUDGMENT—September 17, 1938

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Scott County rendered, be in all things affirmed and stand in full force and effect; and that the said respondent recover against the said appellants its costs and charges herein expended and have therefor execution. (Opinion filed)

[fol. 139] IN SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, SEPTEMBER TERM, 1938

No. 35,278

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of the Missouri Pacific Railroad Company, a Corporation, Appellants,

vs.

SCOTT COUNTY MILLING COMPANY, a Corporation, Respondent

Appeal from the Circuit Court of Scott County

OPINION

Action by trustees of the Missouri Pacific Railroad Company to recover from Scott County Milling Company the sum of $23,994.33, paid to said milling company by said railroad company by reason of an award of damages by way of reparation made by the Interstate Commerce Com-

mission in favor of said milling company and against said railroad company. The judgment below was for defendant and plaintiffs appealed.

Prior to September 14, 1924, respondent, Scott County Milling Company shipped coal in car load lots over the lines of the Missouri Pacific Railroad Company and other lines from points in Illinois and western Kentucky, consigned to respondent at points in Missouri.

Interstate rates charged by public carriers are subject to regulation by the Interstate Commerce Commission under the Interstate Commerce Act of 1887 and subsequent enact- [fol. 140] ments known as the Hepburn Act and the Transportation Act. These acts do not take from the carriers their power, in the first instance, to fix rates, or to increase or reduce them, but they authorize the Commission, either of its own volition, or upon complaint, to determine whether or not the rates fixed and charged by a public carrier are reasonable or unreasonable, to award damages to shippers by way of reparation because of unreasonable charges, and to fix reasonable rates for the future. It is both the common law and statutory duty of public carriers to charge no more than a reasonable rate, and when a carrier, in the first instance, fixes and charges a rate which is not reasonable, it thereby subjects itself to a claim for damages by way of reparation on account of the unreasonable charges made to shippers. Arizona Grocery Company v. Atchison, Topeka & Santa Fe Ry. Co., 284 U. S. 370, 76 Law Ed. 348.

The rates paid by respondent were not established by the Commission but were fixed by the carriers themselves. Respondent paid the rates exacted on all shipments made prior to September 15, 1924, and on that date filed complaint with the Commission charging, in substance, that the rates had been, then were, and for the future would be unreasonable. The complaint asked the Commission to award respondent damages by way of reparation in an amount equal to the difference between the rates charged and the rates that should have been charged.

A hearing was had on said complaint and the Commission found that the rates charged by the carriers were unreasonable both for the past and the future, prescribed reasonable rates for the future, found what would have been reasonable for the past, and awarded to respondent damages by way of reparation in the sum of $20,142.57, with six per cent interest. Between April 4 and April 19, 1929, the rail-

road paid to respondent the award with interest amounting to $23,994.33. Thereafter, on April 25, 1929, the carriers [fol. 141] filed motion for rehearing which the Commission overruled. On September 7, 1929, a second motion for rehearing was filed and later overruled by the Commission. On October 17, 1929, a motion to modify the order was filed and later overruled. On April 26, 1930, a petition for reopening, consolidation and general investigation was filed and later overruled. On June 3, 1931, a supplemental petition for reopening, consolidation and argument was filed and later sustained by the Commission on November 2, 1931. A rehearing was had, and on July 3, 1933, the Commission set aside all of its former orders including the award of damages made to respondent. Thereafter on October 30, 1934, more than five years after the award had been paid to respondent, appellants made written demand on respondent to return the sum of $23,994.33 theretofore paid to it by the Missouri Pacific Railroad.

The Interstate Commerce Act requires public carriers to charge reasonable rates for transportation service. The charge of an unreasonably high rate for such service is a violation of the act. Section 13 of the act (U. S. Code Title 49, Sec. 13) provides that any person or corporation may complain to the Commission because of any violation of the act by rail carrier, and that the Commission shall hear and determine such complaint and make whatever finding and orders the facts and law justify.

Section 16 (U. S. Code Title 49, Sec. 16) provides that if, after hearing on a complaint as provided in section 13, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of the act for violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on a day named.

Paragraph (2) of said Section 16 provides that if a carrier does not comply with an order for the payment of money within the time limit of such order, the complainant may file in the United States District Court, or any state [fol. 142] court of general jurisdiction having jurisdiction of the parties, a petition setting forth the causes for which he claims damages, and the order of the Commission in the premises. Such suit, if in the United States Court, shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order

of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in such court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of suit.

In the instant action respondent filed complaint with the Commission and secured a finding that the rates charged by the carriers were unreasonable, and an order from the Commission directing that the carriers, within a date named therein, pay to respondent damages fixed at $20,142.57 with interest at six per cent, all of which the carriers paid in full before filing its motion for rehearing with the Commission.

Respondent contends that such payment was voluntarily made with full knowledge of all the facts and without fraud or duress, and for that reason alone plaintiff is not entitled to recover, while appellants say that the payment was made under duress and may be recovered.

Appellants' contention is that the payment of the award was made under duress, (1) because there was no remedy by appeal from the Commission's award, and (2) that if the award had not been paid and the shipper had brought suit for damages, the carriers would have been defenseless because the order of the Commission finding that the rates paid by the shipper were unreasonable would have been conclusive on the court, and in the end the carriers would have been compelled to pay costs, interest and attorney's [fol. 143] fees as penalties for resisting the payment of the award.

Appellants' contention cannot be sustained. While the statute does not provide for an appeal from the award made by the Commission, it does provide that if the carrier does not pay the award within the time fixed in the Commission's order, the complainant may, within one year from the date of the award, sue the carrier for damages which, in effect, amounts to a suit to enforce payment of the award. In such a suit the carrier is given its day in court, and may there invoke any and every defense to which it is entitled under the law. We do not agree with appellant's contention that in such a suit the finding and orders made by the Commission are, as a matter of law, conclusive on the court. We agree that the power to fix and regulate interstate rates

of public carriers is legislative and not judicial, and is vested in the Interstate Commerce Commission and not in the courts. We also agree that the power to determine whether or not the "carrier made" rates paid by respondent prior to September 15, 1924, were unreasonable was vested in the Interstate Commerce Commission and not in the courts, but in the exercise of such power it was the duty of the Commission to safeguard the constitutional rights of the carriers, and see that its orders were based on substantial evidence. An order of the Commission which violates the constitutional rights of a carrier, or is based on a finding without evidence or upon evidence which does not support it, is not conclusive on the courts and cannot stand if properly assailed. The rule in this regard is stated by the Supreme Court of the United States in Skinner & Eddy Corporation v. United States et al., 249 U. S. 557, 562, as follows:

"If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission, Loomis v. Lehigh Val- [fol. 144] ley R. R. Co., 240 U. S. 43, 50; Texas & Pacific Ry. Co. v. American Tie & Timber Co., 234 U. S. 138, 146; The Minnesota Rate Cases, 230 U. S. 352, 419; Robinson v. Baltimore & Ohio R. R. Co., 222 U. S. 506; Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481; and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law, Manufacturers Ry. Co. v. United States, 246 U. S. 457, 482; Pennsylvania Co. v. United States, 236 U. S. 351, 361; Los Angeles Switching Case, 234 U. S. 294, 311; Kansas City Southern Ry. Co. v. United States, 231 U. S. 423, 440; Proctor & Gamble Co. v. United States, 225 U. S. 282, 297-298; Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541."

See also cases cited in footnote to Arizona Grocery Company v. Atchison, Topeka & Santa Fe Ry. Co., 284 U. S. 370, 386, 76 L. Ed. 348.

In Meeker v. Lehigh Valley Railroad Company, 236 U. S. 412, 59 L. Ed. 644, 657, the court determined the legal effect of the statute which makes the order of the Commission

prima facie evidence of the facts stated in the order, in the trial of a suit by the shipper against the carrier to recover damages because of the exaction of unreasonable freight charges. The court there said:

"It is also urged, as it was in the courts below, that the provision in section 16 that, in actions like this, 'the findings and order of the Commission shall be prima facie evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

"This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is [fol. 145] merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in anywise work a denial of due process of law. In principle it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained."

Speaking to the same question in Mills v. Lehigh Valley Railroad Company, 238 U. S. 473, 482, 59 L. Ed. 1414, 1418, the court said:

"The statutory provision merely establishes a rule of evidence. It leaves every opportunity to the defendant to contest the claim."

In Watkins on Shippers and Carriers (4th Ed) Section 379, the author says:

"The award is not a judgment but is prima facie evidence of the facts stated, and the finding that a rate exacted is unreasonable and that plaintiff has suffered damages, does not preclude the defendant from showing in court facts constituting a defense."

Appellant argues, in effect, that since the making of a rate for the future, or the determination that a rate charged in the past was unreasonable, are legislative functions vested in the Commission, the result reached by the Commission in the exercise of such functions is conclusive upon

the courts. This argument cannot be sustained. The true rule is stated in Northern Pacific Railway Company et al. v. The Department of Public Works of the State of Washington et al., 268 U. S. 39, 44, as follows:

"But where rates found by a regulatory body to be compensatory are attacked as being confiscatory, courts may enquire into the method by which its conclusion was reached. An order based upon a finding made without evidence, The Chicago Junction Case, 264 U. S. 258, 263, or upon a finding [fol. 146] made upon evidence which clearly does not support it. Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541, 547, is an arbitrary act against which courts afford relief."

In the instant case, the commission found (1) that the rates exacted from respondent in the past were unreasonable, and (2) fixed the rates that should have been charged, and ordered that reparation be made in accordance with the rates so fixed. If these orders of the Commission were within constitutional limits and were based on substantial evidence, the carriers had no lawful right to have them set aside by the Commission. On the other hand if such orders did not safeguard the carriers constitutional rights, or were "based upon a finding made without evidence, or upon a finding made upon evidence which clearly does not support it," the carriers had ample opportunity to have such questions determined by a court of competent jurisdiction before paying the award.

The reparation award made by the Commission is not a judgment and the Commission could not have enforced its payment. The Interstate Commerce Act provides that if a carrier does not pay the award within the time fixed in the Commission's order, the shipper may bring a suit against the carrier in a court of competent jurisdiction to recover damages because of the unreasonable charges exacted, and in such suit the order of the Commission shall be prima facie evidence of the facts stated in such order.

The carrier could have refused to pay the award made by the Commission and awaited a suit by the shipper, in which suit it could have invoked every defense which the law afforded it. It did not take that course, but on the contrary paid the award in full before filing its motion for rehearing with the Commission. Such payment was voluntarily

made with full knowledge of the facts and without fraud or duress. One who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud and duress, cannot recover it back. Claflin et al. v. McDonough, 33 Mo. 412, 415; Ferguson v. Butler County, 297 Mo. 20, 247 S. W. 795; National Enameling & Stamping Co. v. City of St. Louis, 40 S. W. (2d) 593; Bank v. Bank, 244 Mo. 554, 587, 149 S. W. 495.

[fol. 147] It is contended that the payment of the award was made under mutual mistake of fact.

No contention is made that the parties were mutually mistaken about the facts which would determine whether the rates charged were reasonable or unreasonable. Indeed no such contention could be successfully made because the case was submitted to the Commission on an agreed statement of facts about which there is no controversy. The contention is that the reasonableness or unreasonableness of the rates charged was a question of fact to be determined by the Commission; that when the Commission found that the rates charged were unreasonable, both parties thereafter acted under the belief that such rates were unreasonable because the Commission so found; that their mutual mistake in so believing and acting was a mistake of fact not discoverable until the Commission later set aside its order.

A mistaken belief of the parties that the finding of the Commission was either right or wrong would not be a mutual mistake of fact. A mutual mistake of fact, as that term is used in the law, means in this case a mutual mistake as to the existence or non-existence of facts determinative of the reasonableness or unreasonableness of the rate. If the existence of material facts had been unknown to the parties, or if they had acted under the mistaken belief of the existence of facts which did not exist, it might then be said that they acted under a mutual mistake of fact. But such is not the case. Both parties knew the facts and submitted the case to the Commission on an agreed statement of facts. If the finding of the Commission on the agreed statement of facts was wrong, that was merely an error in the decision of the Commission on the agreed facts, for which the statute afforded the carriers a complete and adequate remedy.

Contention is made that respondent has received money which is now the property of appellants, and which, in equity and good conscience, respondent should pay to appellants.

In an action for money had and received the plaintiff is entitled to recover if, under the facts shown, it would be con- [fol. 148] trary to equity and good conscience for the defendant to retain the money. The converse of the rule is also true. In such an action the plaintiff cannot recover if it appears from the facts that it would be inequitable and unjust to compel defendant to return the money. Teasdale v. Stoller, 133 Mo. 645, 34 S. W. 873; Bull v. United States, 295 U. S. 247; Atlantic Coast Line Railroad Company v. Florida, 79 L. Ed. 1451; 41 C. J. p. 51, Sec. 39.

A reparation award is not a judgment, and the Commission has no power to enforce its payment. The only method provided for enforcing payment is in a suit for damages brought by the shipper against the carrier in a court of competent jurisdiction, within one year from the date of the award. In this case the carrier did not await the bringing of such a suit in which it could have asserted its defenses, if any, but with full knowledge of all the facts and without fraud or duress, voluntarily paid the award in full before filing its motion for rehearing with the Commission, and without hint or suggestion to respondent that the matter would be further litigated. The effect of the carrier's act in voluntarily paying the award under the circumstances shown, was to treat the matter as a closed transaction, and cause respondent to believe that the litigation was ended.

Respondent was under contract to pay its representative fifty per cent of the amount recovered from the carrier. When the carrier voluntarily paid the award in full, respondent treated the case as a closed transaction and paid its representative ($11,997.16), fifty per cent of the award, and used the balance for its general corporate purposes, including payment of dividends to its stockholders. The carrier paid the award in April, 1929, and did not demand return of the money until October 30, 1934. If respondent were required, at this late date, to repay the amount of the award to the carrier, it would mean a loss to respondent of the $11,997.16 which it paid to its representative, since the Statute of Limitations would now be a complete bar to any claim respondent might assert against its representative for the return of the money. Furthermore, respondent would be deprived of his statutory right to have some court deter- [fol. 149] mine the validity of its claim against the carrier, since the carrier's voluntary payment of the award prevented respondent from bringing a suit for damages in a

court of competent jurisdiction, within one year from the date of the award, wherein the rights of the parties could have been judicially determined.

The record justifies the conclusion that the carrier's voluntary payment of the award caused respondent to believe that the matter was a closed transaction, and induced it to act on that belief and thus alter its position by paying to its representative fifty per cent of the award. Respondent is now in a position where it cannot recover back the amount paid to its representative, or maintain an action against the carrier for damages on account of the exaction of unreasonable rates, because both claims are long since barred by the Statute of Limitations. These changed conditions were caused by the carriers voluntary payment of the award, and its long wait thereafter before demanding return of the money so paid. It would be against equity and good conscience and a rank injustice to require respondent to repay the amount of the award to the carrier when the carrier's own act in voluntarily paying the award induced respondent to change its position so that it cannot now be placed in statu quo.

In 48 C. J. 767, Sec. 327, the rule is thus stated:

"In general, where a payee has changed his position to his prejudice in reliance upon the payment and cannot be placed in statu quo, the payment cannot be recovered, although made under mistake of fact; and so, where the payee has irrevocably changed his position in reliance upon a payment made by the payor under a mistake of fact caused by his own negligence or lack of diligence in taking advantage of means and knowledge available to him, there can be no recovery except when the payor's negligence was induced by negligence on the part of the payee, * * *."

Our courts state the law as follows:

"The rule is that when one, by his own words or conduct, willfully causes another to believe in a certain state of things, [fols. 150-151] and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. Lumber Co. v. Kreeger, 52 Mo. App. 418 at 421, *ante*; Savings Ass'n v. Kehlor, 7 Mo. App. 158; Taylor v. Zepp, 14 Mo. 482; Bates v. Perry, 51 Mo. 449; Spurlock v. Sproul, 72 Mo. 503; Acton v. Dooley, 74 Mo. 63."

Other contentions are made by the parties, but since what we have said necessarily determines the case, no purpose would be served in discussing other questons raised.

The judgment below was for the right party and should be affirmed. It is so ordered.

William F. Frank, P. J.

Per Curiam:

The foregoing opinion prepared by the late William F. Frank, Presiding Judge of Division One, being unsigned at the time of his death, is now adopted as the opinion of the court. All of the Judges concur except Lucas, J. not sitting because not a member of the court when cause was submitted.

[fol. 152] In Supreme Court of Missouri

[Title omitted]

Appellants' Motion for Rehearing—Filed September 24, 1938

Come now the appellants in the above-entitled cause and respectfully move the Court to grant to appellants a rehearing of said cause and of the issues involved therein, and as grounds therefor show:

I

This cause is a suit by appellants (plaintiffs below) to recover from respondent (defendant below) damages paid [fol. 153] by way of reparation pursuant to an order of the Interstate Commerce Commission, which order was thereafter set aside by such Commission.

As appears by the abstract of the record herein and brief filed by appellants, there was duly submitted to this Court the question of whether, if suit had been brought to enforce the said award entered by the Interstate Commerce Commission, the defendants in that suit could have tried out before the Court the question of the reasonableness or unreasonableness of the rates involved in the proceeding before the Interstate Commerce Commission, which rates had been found unreasonable by that body, and on account of which finding the award, which was thereafter set aside, had been paid by appellants.

The Court in its opinion filed in this cause overlooked deciding that question, which question, in the opinion of appellants, was and is decisive of the case.

II

The Court in this cause, in its opinion filed herein, holds that if the order entered by the Interstate Commerce Commission against the appellants, and on account of which awards of reparation were paid respondent by appellants, did not safeguard the carriers' constitutional rights, or were "based upon a finding made without evidence, or upon a finding made upon evidence which clearly does not support it," the carriers had ample opportunity to have such question determined by a court of competent jurisdiction before paying the award.

It appears from the abstract of record filed in this cause that no constitutional right was involved or asserted by [fol. 154] appellants because of any order entered by the Interstate Commerce Commission, and it further appears from the agreed statement of facts, upon which this cause was tried in the court below, that the question of whether the order of the Commission was based upon a finding made without evidence, or upon a finding made upon evidence which clearly did not support it, was not within the issues of this cause.

III

The Court in its opinion finds that the proceedings before the Interstate Commerce Commission, which resulted in an award of reparation against appellants, were tried before such Commission upon an agreed statement of facts, and that being so, there could be no mistake of facts upon the part of either the appellants or respondent.

It appears from the abstract of the record filed in this cause that such proceedings before such Commission were not tried under an agreed statement of facts, but, on the contrary, that that proceeding was one of the most hotly-contested proceedings ever had before the Commission, and that at no time was any agreed statement of facts ever filed before such Commission, and that that body decided the cause before it upon testimony offered by the complainants and defendants in such proceeding.

It appears from the opinion of this Court filed in this cause that the Court was of the view that the payments made by appellants and sought to be recovered back were paid as the result of an award entered by the Interstate Commerce Commission in the proceeding before it that was [fol. 155] tried on an agreed statement of facts, and that because such proceeding before the Commission was tried upon an agreed statement of facts, there could be no mistake as to the facts by appellants, and that any payments made by the appellants were voluntary.

In so holding this Court overlooked the fact, in the opinion of appellants, also decisive of this case, which is that this award was paid not by reason of any proceeding before the Commission, tried upon an agreed statement of facts by that body, but as the result of an award of reparation entered by the Commission after several hearings, at which all parties to such proceeding introduced testimony.

IV

Also, this Court having erroneously found that the proceedings out of which this litigation grew and had before the Interstate Commerce Commission were tried by that body upon an agreed statement of facts, evidently was led to give no consideration to the point urged by appellants that where respondent had received money which is the property of the appellants, and which in equity and good conscience it should pay to appellants, the latter were entitled to recover the money back without regard to the question of voluntary payment.

[fol. 156] Argument in Support of Motion for Rehearing

I

As we have set forth in our motion for rehearing, this Court held that in a suit to recover on an award of reparation entered by the Interstate Commerce Commission the defendant in that suit could show as defenses that the order granting the award of reparation did not safeguard the carriers' constitutional rights, or was based upon a finding made without evidence, or upon a finding made upon evidence which did not support it.

There is no question but that this is the law, but a discussion of such question is academic, in so far as this proceeding is concerned. The question presented to this Court,

and which it failed to decide unless it decided such question by inference, is whether upon a suit to collect an award of reparation the court before which such suit was being tried could inquire into the question whether or not the rate which the Interstate Commerce Commission had found unreasonable when assessed and because of which finding an award of reparation had been entered, was or was not unreasonable.

In other words, if the Interstate Commerce Commission found a rate unreasonable and awarded reparation on account thereof, could a carrier, when suit had been brought to enforce such award, set up as a defense that the finding of the Commission that such rate was unreasonable, was erroneous, and have the court again decide that question?

[fol. 157] We admit that an order of the Commission that confiscates the property of a carrier, or that is made without evidence to support it, may be attacked at any time, but the point we urge and which this Court failed to decide is, in addition to this question of confiscation, or whether the order in question was made without evidence, can the carrier urge, in a suit to enforce an award of reparation, that the finding of the Commission that the rate involved was unreasonable, was erroneous, and without regard to confiscation or lack of evidence, relitigate that question before the Court?

The following cases cited by appellants and seemingly overlooked by the Court establish the doctrine that in a suit to enforce an award of reparation the carrier defendant cannot raise or try out again the question of the reasonableness or unreasonableness of the rates involved in a proceeding before, and decided by, the Interstate Commerce Commission:

South Carolina Asparagus Assn. v. Southern Railway, 64 Fed. (2d) 419;

Mitchell Coal & Coke Co. v. P. R. R. Co., 230 U. S. 247, 258;

United States v. L. & N. R. Co., 235 U. S. 314;

P. R. R. Co. v. International Coal Co., 230 U. S. 184, 185;

Virginian Railway Co. v. United States, 272 U. S. 659;

Texas and Pacific Railway Co. v. Abilene Cotton Oil Company, 204 U. S. 428, 440.

[fol. 158] At page 8 of its opinion this Court says:

"The carrier could have refused to pay the award made by the Commission and awaited a suit by the shipper, in which suit it could have invoked every defense which the law afforded it."

This language does not say just what defenses the law affords a carrier in such suit, and nowhere in the opinion of the Court is the question decided in terms as to what defenses the law affords a carrier.

Appellants urged in this court that the carrier was not afforded the defense of asserting that the Interstate Commerce Commission's finding was erroneous as to the reasonableness of the rates involved, and this Court did not in terms decide that question. As stated in our brief, we think it is no longer an open question and that the carriers have no such a defense when suit is brought upon an award of reparation.

II

As to this second reason for asking a rehearing in this cause, we call attention to the fact that the Court holds that if the carriers' constitutional rights are infringed, that it may set up as a defense in a suit to collect an award of reparation all of these constitutional rights which the carrier claims were denied it, and may also set up the fact that the order of the Interstate Commerce Commission was made without evidence.

This is again departing from any issue in this cause. The appellants do not assert that any of their constitutional rights were taken away. They assert that the money sought [fol. 159] to be recovered was paid under duress, i. e., pursuant to a finding of the Commission that the rates when assessed were unreasonable, and that the respondents had suffered damages because of having been forced to pay unreasonable rates. The duress, in part, was the fact that the carriers, if suit were brought to enforce the award, could not try out again before the Court the question of reasonableness or unreasonableness of the rates involved, and that therefore they would have no defense to the suit.

Further, as appears from the agreed statement of facts filed in the court below, and upon which this case was tried below, no constitutional rights as such were put forward, and it does not appear from such agreed statement of facts

that there was any question of whether the order entered by the Commission was or was not supported by testimony. That issue was never in the case and is not in the case now.

III

When it came to the question of whether the payments made by appellants to respondent were voluntary or were made under duress, the learned Judge evidently did not familiarize himself with all the facts. This appears from the opinion:

"A mistaken belief of the parties that the finding of the Commission was either right or wrong would not be a mutual mistake of fact. A mutual mistake of fact, as that term is used in the law, means in this case a mutual mistake as to the existence or nonexistence of facts determinative of the reasonableness or unreasonableness of the rate. If the existence of material facts had been unknown to the parties, [fol. 160] or if they had acted under the mistaken belief of the existence of facts which did not exist, it might then be said that they acted under a mutual mistake of fact. But such is not the case. Both parties *knew* the facts and submitted the case to the Commission on an *agreed statement of facts.* If the finding of the Commission on the agreed statement of facts was wrong, that was merely an error in the decision of the Commission on the agreed facts, for which the statute afforded the carriers a complete and adequate remedy." (Emphasis ours.)

It conclusively appears from the abstract of record filed in this cause that the proceedings before the Commission, and in which the awards of reparation in question were entered, were hotly contested, were tried three times before that body and each time upon volumes of testimony offered by the complainants and defendants in that proceeding. The question of an agreed statement of fact was unheard of and we cannot conceive how the learned Judge made such an error in stating the facts, unless he became confused by the fact that this case was tried in the court below upon an agreed statement of facts. The fact remains, however, that the principal basis for the holding that the payments were voluntary is that the proceedings before the Commission were tried upon an agreed statement of facts, and that all of the parties to such proceeding knew all about the

facts. This error is, of course, apparent, and the question remains, had the learned Judge who wrote the opinion known that the proceeding before the Commission was not upon an agreed statement of facts, would his views have been otherwise? In any event, it is apparent that this Court [fol. 161] should decide this case having regard to the fact that the proceedings before the Commission were not, as stated in the opinion filed, tried upon an agreed statement of facts, but upon testimony—volumes of testimony—offered by all parties to that litigation.

The fact that the Court erred in finding that the proceedings before the Interstate Commerce Commission and out of which this case grew were tried on an agreed statement of facts, evidently resulted in the Court giving no consideration to the cases cited by appellants, which, in the opinion of appellants, hold that the payments sought to be recovered back were made under a mistake of fact and could be recovered back. Some of such cases are:

Picotte v. Mills, 200 Mo. App. 137;
Miller v. Fire Brick Co., 139 Mo. App. 25;
Norton v. Bohart, 105 Mo. App. 615;
Missouri Pacific R. Co. v. Askew Saddlery Co., 215 Mo. App. 277.

IV

Following the erroneous finding of fact by this Court that the proceedings before the Interstate Commerce Commission and out of which this litigation grew were tried before such Commission under an agreed statement of facts, the Court evidently felt it unnecessary to decide the point urged by appellants, which was to the effect that the respondent had received money which is the property of appellants and which in equity and good conscience it should pay to appellants without regard to the fact of [fols. 162-163] whether the payments made by appellants were voluntary. The cases cited under such point were:

Warren v. Railway Conductors of America, 199 Mo. App. 200;
Teasdale v. Stoller, 133 Mo. 645;
Bull v. United States, 295 U. S. 247.

The point should not be overlooked that in deciding this case the Court is in effect construing a federal statute and is called upon to decide whether under the terms of that stat-

ute the appellants are entitled to recover the money herein sued for. The following cases, which were cited in appellants' brief and seemingly overlooked by the Court, in our opinion establish the fact that the payments sought to be recovered back were, in fact, involuntary and made under duress:

Cleveland v. Richardson, 132 U. S. 318;
Atchison etc. R. Co. v. O'Connor, 223 U. S. 280.

The appellants, therefore, pray the Court to grant to them a rehearing of the issues involved in the above-entitled proceedings.

Respectfully submitted, Thomas J. Cole, Dearmont, Spradling & Dalton, H. H. Larimore, Attorneys for Appellants.

[fol. 164] IN SUPREME COURT OF MISSOURI

[Title omitted]

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO APPELLANTS' MOTION FOR REHEARING—Filed September 29, 1938

The first question raised by the appellants in their motion for rehearing is that the Court did not pass on the question raised by appellants as to the effect of the order made by the Interstate Commerce Commission in awarding reparation, and whether, if suit had been brought on the award, the carrier could contest such suit. It will be con-
[fol. 165] ceded, of course, that the Court's opinion does not decide this question as the appellants asked the Court to decide it, but an examination of the opinion, however, discloses that the Court did deal with this question and passed on it, and held: (1) that the award of reparation was not a judgment, but prima facie evidence of the facts therein stated; (2) that if the Commission did not act within constitutional limits and its finding was not based on substantial evidence, the carriers had ample opportunity to have such questions determined by a court of competent jurisdiction before paying the award, and holds: "The carrier could have refused to pay the award made by the Commission and awaited a suit by the shipper, in which suit it could have invoked every defense which the law afforded it. It did not take that course, but, on the contrary, paid the

award in full before filing its motion for rehearing with the Commission. Such payment was voluntarily made with full knowledge of the facts and without fraud or duress."

In passing upon the first question raised in appellants' motion for rehearing it should be borne in mind that the record does not disclose what evidence was offered before the Interstate Commerce Commission at the time it made its order. Therefore this Court cannot say, as a matter of fact, whether or not the award was based on sufficient evidence or whether or not the ordered rate was confiscatory. If the rates were confiscatory or if there was not sufficient evidence before the Commission upon which to base its award, these matters could have been fully contested in a suit brought to enforce the award. Without any evidence whatever in the record as to the character of evidence be- [fol. 166] fore the Commission or as to whether the rate ordered by the Commission was confiscatory, the appellants want this Court to assume that there was sufficient evidence upon which to base the award and that the rates were not confiscatory and then determine by its opinion what appellants' rights would have been had this condition been shown to have existed. The question is entirely a moot one, was not essential to the decision of the case at all, and, of course, the moot question was not decided by the Court as the appellants would like for the decision to have been made.

The second question raised in the motion for rehearing is that the opinion erroneously stated that the case before the Commission was tried upon an agreed statement of facts. The late Judge Frank, in writing the opinion, did erroneously state in the opinion that the matter was tried before the Commission upon an agreed statement of facts, but the reasoning he employed in reaching the conclusion that the payment was made under a mutual mistake of fact makes wholly immaterial the fact that he did erroneously say that the matter was submitted to the Commission on an agreed statement of facts. We call specific attention to the language employed by the Court in the opinion in this case:

"A mistaken belief of the parties that the finding of the Commission was either right or wrong would not be a mutual mistake of fact. A mutual mistake of fact, as that term is used in the law, means in this case a mutual mistake as to the existence or nonexistence of facts determinative of the reasonableness or unreasonableness of the rate. If the

existence of material facts had been unknown to the parties, [fol. 167] or if they had acted under the mistaken belief of the existence of facts which did not exist, it might then be said that they acted under a mutual mistake of fact."

It is very apparent that under the rule of law laid down by this Court in its opinion it is wholly immaterial whether the Interstate Commerce Commission's finding was based upon conflicting evidence or upon an agreed statement of facts, because in either event the Commission reached a conclusion which might be either right or wrong, and, as the Court properly said, "a mistaken belief of the parties that the finding of the Commission was either right or wrong would not be a mutual mistake of fact."

The next statement of law enunciated by the Court in its opinion was to the effect that a mutual mistake in this case would be a mutual mistake as to the existence or nonexistence of facts determinative of the reasonableness or unreasonableness of the rate, and applying that statement to this case it would make no difference whether the case was submitted to the Commission on an agreed statement of facts or upon conflicting testimony, because there is nothing in the record in this case to show that there was any mutual mistake as to the existence or nonexistence of facts determinative of the reasonableness or unreasonableness of the rate. In fact, the case having been submitted on conflicting testimony, the conclusion would be irresistible that there was no mutual mistake about what the facts were, because the shipper claimed certain facts were true, the carrier maintained that other facts were true, and, therefore, there is no showing at all that there was any mutual mistake about anything.

[fol. 168] The next contention raised in appellants' motion is that the Court did not pass on the question as to whether or not in equity and good conscience appellants should recover without regard to whether the payment was voluntarily made.

Appellants are clearly wrong in this contention, for the Court's opinion in this case not only meets that issue, but decides it squarely, and the decision on that phase of the case disposes of the whole case. This Court held, and we think properly so, that it would be against equity and good conscience and a rank injustice to require the respondent

to pay the amount of the award to the carrier, when the carrier's own act in voluntarily paying the award induced the respondent to change its position so that it cannot be placed in statu quo. The Court's opinion sets out that the appellant paid the award before it even filed a motion for rehearing and thereby led the respondent to treat the matter as a closed transaction; that the respondent, under a contract, paid its representative 50 per cent of the award and used the balance for general corporate purposes, and that the appellant did not seek to recover the award until after the Statute of Limitations had been a complete bar to any claim the respondent might have against its representative for the money, and the Court further held that the respondent would now be deprived of its statutory right to have some court determine the validity of its claim against the carrier.

In the suggestions in support of appellants' motion it is stated on page 11 that the Court overlooked certain cases cited by appellants, and appellants cite the cases, among others, of Teasdale v. Stoller, 133 Mo. 645; Bull v. United [fol. 169] States, 295 U. S. 247. Appellants certainly overlooked the following quotation from the opinion:

"In such an action the plaintiff cannot recover if it appears from the facts that it would be inequitable and unjust to compel defendant to return the money. Teasdale v. Stoller, 133 Mo. 645, 34 S. W. 873; Bull v. United States, 295 U. S. 247; Atlantic Coast Line Railroad Company v. Florida, 79 L. Ed. 1451; 41 C. J., p. 51, Sec. 39."

The last suggestion made as to why the rehearing ought to be granted, found on page 11 of appellants' motion for rehearing and suggestions, is to the effect that in deciding this case this Court was, in effect, construing a federal statute and that this Court is called upon to decide whether or not under that statute the appellants are entitled to recover the money sued for. In appellants' original statement, brief and argument, on page 18, under points and authorities, appellants said:

"The action is one for money had and received, and not for the recovery of freight charges."

The law with respect to the right of recovery in an action for money had and received is not in any sense a federal question, does not depend upon federal statutes, but depends

alone upon the circumstances under which the money was paid, and the decision of the Court in this case, holding that it would be inequitable to require the defendant to repay to the plaintiff the money paid by way of reparation, is in harmony with the decided cases in Missouri and with the law generally, as laid down by the courts in the several states of the Union.

[fol. 170] It is quite unfortunate that in what was probably the last opinion written by so able a judge as the late Judge Frank, he should through inadvertence have erroneously stated that the matter before the Interstate Commerce Commission was decided on an agreed statement of facts, when in fact their order was based upon the finding from conflicting evidence; but this error is not at all important, so far as reaching an ultimate conclusion in the case, and the decision of the Court having been for the right party and in harmony with the law heretofore written by the courts of the state, we ask that the motion for rehearing be denied.

Respectfully submitted, Bailey & Bailey, Finch & Finch, Attorneys for Respondent.

[fol. 171] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—November 19, 1938

Now, at this day, the Court having seen and fully considered appellants' motion for a rehearing, doth order that said motion be, and the same is hereby overruled.

[fol. 172] IN SUPREME COURT OF MISSOURI

[Title omitted]

APPELLANTS' MOTION TO TRANSFER TO COURT EN BANC—Filed November 28, 1938

Come now the appellants, the losing parties in the above-entitled cause, and respectfully move the Court to transfer said cause to the Court en Banc on the ground that a federal question is involved in said cause and in any decision made or entered therein.

[fol. 173] Argument in Support of Motion to Transfer to the Court en Banc

One of the errors assigned by appellants was the failure of the court below to give instruction No. VI requested by appellants (plaintiffs below), which, in effect, if given, would have declared the law to be that, if the Missouri Pacific Railroad Company paid the amount sued for in obedience to orders of the Interstate Commerce Commission, appellants were entitled to recover back such payments upon the said Commission setting aside such orders. Appellants also assigned as error the failure of the court below to hold that, under the law and facts, appellants are entitled to recover back the money paid by the Missouri Pacific Railroad Company to respondent, as set out in the petition.

A decision of these points involves a construction of paragraphs (1) and (2) of Section 16 of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 16), which are as follows:

"(1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was [fol. 174] made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall

be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit;"

and also involves the construction of Section 13 (U. S. Code, Title 49, Sec. 13) of the Interstate Commerce Act.

The construction of the foregoing statutes contended for by appellants in this court and in the court below was and is to the effect that money paid thereunder, by reason of any order of the Interstate Commerce Commission thereafter set aside, could be recovered back. Section 25 of the Judiciary Act of 1789 expressly conferred jurisdiction upon the Supreme Court in cases where a right claimed under a Federal statute was denied by the construction of such statute.

It is also well settled that when other requirements are met, cases involving the construction of Federal laws, but [fols. 175-176] not drawing into question their validity, are reviewable under Section 237 (b) of the Judicial Code.

Hughes Brothers Timber Co. v. State of Minn., 272 U. S. 469, 47 S. Ct. 170, 71 L. Ed. 359.

The refusal of the state court to give a Federal statute the construction insisted upon by a party which would lead to a judgment in his favor is a denial to him of a right or immunity under the laws of the United States.

St. L., I. M. & S. v. Taylor, 210 U. S. 281, 293, 28 S. Ct. 216, 52 L. Ed. 348;

Southern Railway v. Crockett, 234 U. S. 725, 730, 34 S. Ct. 897, 58 L. Ed. 1564;

St. L., I. M. & S. v. McWhirter, 229 U. S. 265, 275, 33 S. Ct. 84, 58 L. Ed. 192.

This holding by this Court that money paid pursuant to an order of the Commission entered under the provisions of said Section 16 of the Interstate Commerce Act, may not be recovered back, though such order had been set aside by such Commission, is an erroneous construction of a Federal statute and a denial to appellants of a right which said appellants have under such statute.

Wherefore, appellants pray the Court to transfer the above-entitled cause to the court en banc.

Respectfully submitted, Thomas J. Cole, Dearmont, Spradling & Dalton, H. H. Larimore, Attorneys for Appellants.

[fol. 177] IN SUPREME COURT OF MISSOURI

[Title omitted]

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO MOTION TO TRANSFER TO COURT EN BANC—Filed November 30, 1938

Comes now respondent and files this its suggestions in opposition to appellants' motion to transfer to the court en banc for the reason that there is no federal question involved in the cause, as shown by the record.

This is an action for money had and received, and in appellants' original brief, page 18, points and authorities VII, the appellants so concede.

[fol. 178] In appellants' motion, page 2, appellants say that a federal question was involved because of the Court's failure to give instruction number six requested by appellants, which appellants say in effect declared that if the Missouri Pacific Railroad Company paid the amount sued for in obedience to the order of the Interstate Commerce Commission, appellants were entitled to recover back such payments upon the Commission's setting aside such orders.

At the outset we want to call the Court's attention to the fact that any action of the trial court with respect to instruction number six was not before this Court for review and was abandoned by the appellants in the trial court. Appellants' motion for new trial is set out in the abstract of the record filed in this cause, pages 133, 134 and 135, and an examination of appellants' motion for new trial shows that the appellants did not assign the failure of the Court to give instruction number six as an error, either by general or specific assignment in the motion. We deem it wholly unnecessary to cite authorities to the effect that where the giving or refusing of an instruction is not complained of in the trial court by motion for new trial, such matter is abandoned and is no longer an issue in the case.

Appellants say that they also assigned as error the failure of the court below to hold that under the law and the facts appellants are entitled to recover back the money paid by the Missouri Pacific Railroad. An examination of the abstract, pages 125, 126, 127, 128, 129, 130 and 131, shows that every declaration of law tendered by the plaintiffs below, [fol. 179] the appellants herein, was given by the trial court except number six, and the refusal of the Court to give declaration of law number six tendered by the plaintiffs below was not complained of in the motion for new trial.

The appellants' petition was not bottomed upon any right created, established or set out in any federal statute, nor was it based upon any provision of the Federal Constitution. It was simply a suit for money had and received, in which the plaintiffs pleaded much of their evidence, but this, of course, did not change the character of the suit. A suit for money had and received is a common law action, and to that action, although one at law, equitable defenses are available. The defendant pleaded in its answer equitable defenses and that the payment was a voluntary payment. The undisputed testimony was that the officers of the Missouri Pacific said that they were going to pay the reparation because the Frisco was paying. Neither the trial court nor this Court, by its opinion, denied the plaintiff any right given by any federal statute, and the cases cited in appellants' motion, page 4, holding that the refusal to give an instruction based upon some federal statute or its construction raises a federal question are not authoritative in this case for the reason that the appellants abandoned their instruction attempting to raise the construction of a federal statute by their failure to complain of the action of the Court in refusing to give instruction number six in their motion for new trial.

We earnestly insist that there is no federal question involved, and therefore that this case ought not to be trans-
[fol. 180] ferred to the court en banc, and we, therefore, submit that the appellants' motion should be overruled.

Respectfully submitted, Bailey & Bailey, Finch & Finch, Attorneys for Respondent.

[fol. 181] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION TO TRANSFER TO COURT EN BANC—December 20, 1938

Now at this day, the Court having seen and fully considered appellants' motion to transfer to Court en Banc, doth order that said motion be, and the same is hereby overruled.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 182] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 13, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED OCT
FEB 6 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 650

L. W. BALDWIN AND GUY A. THOMPSON, AS TRUSTEES OF MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,
Petitioners,

vs.

SCOTT COUNTY MILLING COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

THOMAS J. COLE,
RUSSELL L. DEARMONT,
H. H. LARIMORE,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 650

L. W. BALDWIN AND GUY A. THOMPSON, AS TRUSTEES OF MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,
Petitioners,

vs.

SCOTT COUNTY MILLING COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Your petitioners, L. W. Baldwin and Guy A. Thompson, as trustees in charge of and operating the properties of Missouri Pacific Railroad Company, respectfully present to this Honorable Court this their petition for a writ of certiorari, to be directed to the Sup. eme Court of Missouri, commanding said court and the clerk thereof to certify to this Court a transcript of the record and proceedings in this cause in said court wherein your petitioners were appellants and the respondent here was respondent in said court, together with the opinion of said court, for review and determination of said cause by this Court.

Your petitioners present herewith a certified copy of the record in the said Supreme Court of Missouri.

Summary Statement of the Matter Involved.

On or about September 15, 1924, the respondent and others filed a complaint with the Interstate Commerce Commission against the Missouri Pacific Railroad Company and other carriers alleging that the rates charged by such carriers on bituminous coal, carload, from points in southern Illinois and western Kentucky to points in southeastern Missouri and northeast Arkansas were unreasonable for the past, present and the future. That complaint was styled *Scott County Milling Company et al.* v. *Butler County Railroad Company et al.*, Docket No. 16,323.

Following two hearings of said case before the Commission, that body on February 11, 1929, and March 11, 1929, by order and supplemental order, respectively, entered pursuant to the provisions of section 16 of the Interstate Commerce Act (Title 49, Sec. 16, U. S. Code), directed the Missouri Pacific Railroad Company and other carriers to pay to the respondent on or before a day named in such orders the sums to which the Commission found the respondent was entitled.

The order of the Commission directing the carriers to pay to the complainant the sums to which it found the complainant was entitled was based upon a report and finding of the Commission that complainant was entitled to an award of damages because of having been forced to pay rates found by the Commission to have been unreasonable when assessed by the carriers.

Pursuant to the orders of the Commission dated February 11, and March 11, 1929, and to the demand of the respondent, the Missouri Pacific Railroad Company at various dates between April 4 and April 19, inclusive, 1929, as de-

livering carrier, paid to the respondent in settlement of such award of damages the sum of $23,994.33.

On the 25th day of April, 1929, the Missouri Pacific Railroad Company and other carriers filed with the Commission in said case No. 16,323, a motion for rehearing and for reconsideration, which motion was denied on June 10, 1929.

On November 2, 1931, on supplemental petition of carriers and on the record as made, the Commission reopened its case No. 16,323, and after further hearing, on July 3, 1933, entered further orders which, among other things, directed that the orders theretofore entered in said cause, including the orders entered July 12, 1926, July 10, 1928, February 11, 1929, and March 11, 1929, and all other orders theretofore entered, be set aside, vacated and annulled.

Whereupon, on the 30th day of October, 1934, the petitioners demanded of respondent the payment of the said sum of $23,994.33 theretofore paid to it by the Missouri Pacific Railroad Company and payment thereof by the said respondent was refused.

Suit was instituted by petitioners against respondent in the Circuit Court of Scott County, Missouri, to recover the amount paid as aforesaid. The case was tried upon an agreed statement of facts (R. 22) and the finding and judgment was for respondent on the ground, among others, that the payments made by the Missouri Pacific Railroad Company to the respondent were voluntary payments and made with full knowledge of all facts.

Petitioners duly appealed to the Supreme Court of Missouri and that court affirmed the judgment of the lower court and, by opinion filed, held that the payment of the award of damages, pursuant to the orders of the Commission under section 16 of the Interstate Commerce Act, was voluntary, made with full knowledge of all of the facts and could not be recovered. The Supreme Court of Missouri

also held in such opinion that the payment in question found by such court to be voluntary was a holding out to respondent that the litigation was ended and induced respondent to change its position so that it could not now be placed *in statu quo*.

Petitioners contended in the trial court and in the Supreme Court of Missouri that the money sued for was paid pursuant to reports and orders of the Interstate Commerce Commission and that upon the setting aside by the Commission of such reports and orders, petitioners were entitled to recover from respondent the amount so paid, this on the grounds that the payments to respondent were involuntary and were made under a mutual mistake of fact and that it would be inequitable to permit respondent to retain the sums so paid.

Reasons Relied on for the Allowance of the Writ.

1. The Supreme Court of Missouri held that the payment of the award of reparation in question to respondent pursuant to orders of the Commission entered in accordance with the provisions of section 16 of the Act (U. S. Code, Title 49, Sec. 16), without suit having been brought by respondent to enforce such orders of the Commission, was voluntary and could not be recovered though such orders had thereafter been set aside by the Commission.

2. The Supreme Court of Missouri held, in construing said section 16 of the Act, that the carrier should have refused to have paid the award entered by the Commission and awaited a suit by the shipper in which suit it could have invoked every defense which the law afforded it, and that the payment of the award before filing motion for rehearing with the Commission and without suit having been brought thereon was a voluntary payment and could not be re-

covered although such orders of the Commission had thereafter been set aside by that body.

3. The Supreme Court of Missouri also held that payment of the award in question without waiting for suit to be brought thereon was not a payment made under a mistake of fact, but was a payment voluntarily made with a full knowledge of all of the facts and could not be recovered by petitioners though the award in question had been set aside by the Commission.

4. The Supreme Court of Missouri held that since in its opinion the payment of the award in question was voluntary, such payment caused respondent to believe that the matter was a closed transaction and that it would be inequitable to require respondent to refund the amount so paid even though the Commission had set aside the award of reparation in question and all orders requiring the payment thereof because the respondent could not now be placed *in statu quo*.

The foregoing holdings of the Supreme Court of Missouri numbered 1, 2, 3 and 4, raise federal questions which have not heretofore been decided by this Court and involve a construction of said section 16 of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 16).

Petitioners contend that the payment of the award of damages in question, pursuant to the orders of the Interstate Commerce Commission entered in accordance with the provisions of said section 16 of the Interstate Commerce Act, under a correct construction of that Act was involuntary and that since the said orders of the Commission have been vacated and set aside, can be recovered back.

Petitioners also contend that under a proper construction of said section 16 of the Act, payment of an award of repara-

tion which is thereafter set aside and vacated by the Commission, is a payment under a mistake of fact.

Finally, petitioners contend that since payment of an award of reparation entered by the Commission in accordance with the provisions of said Section 16 of the Act is not voluntary, a correct construction of said Section 16 is that it would not be inequitable to permit such payment to be recovered if such an award of damages is set aside and vacated by the Commission.

WHEREFORE your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of Missouri, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 35,278, L. W. Baldwin and Guy A. Thompson, as Trustees of the Missouri Pacific Railroad Company, a Corporation, plaintiffs-appellants, *vs.* Scott County Milling Company, a Corporation, defendant-respondent; that the said judgment of the Supreme Court of Missouri may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

THOMAS J. COLE,
RUSSELL L. DEARMONT,
H. H. LARIMORE,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 650

L. W. BALDWIN AND GUY A. THOMPSON, AS TRUSTEES OF MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,
Petitioners,

vs.

SCOTT COUNTY MILLING COMPANY, A CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion of the Supreme Court of Missouri has not yet been officially reported, but appears at page 101 of the record.

Jurisdiction.

1. The judgment sought to be reviewed is a final judgment which has been rendered by the Supreme Court of Missouri (Division No. 1), the highest court of that State in which a decision of the controversy could be had.

2. The date of the judgment to be reviewed is September 17, 1938 (R. 101).

3. Motion by petitioners for a rehearing was filed in the Supreme Court of Missouri pursuant to the provisions of Rule 21 of that court, which motion for rehearing was by such court fully considered and overruled on the 19th day of November, 1938 (R. 122).

4. In accordance with the provisions of Section 4, Article VII, of the Constitution of Missouri, providing that when a Federal question is involved, the cause on the application of losing party shall be transferred to the Court *en banc,* and also in accordance with the provisions of Rule 24 of the Supreme Court of Missouri, petitioners filed motion to transfer cause to Court *en banc,* which motion the Court fully considered and overruled on the 20th day of December, 1938 (R. 126).

5. The specific claim advanced by petitioners in the lower court, decided adversely to them, and which is relied upon as a basis of this Court's jurisdiction was that the money sued for was paid pursuant to the orders of the Interstate Commerce Commission based upon an award of damages entered by that body and that since such an award of damages and orders based thereon had been set aside, petitioners were entitled to recover back the amount so paid.

Under the construction placed upon Section 16 of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 16) by the Supreme Court of Missouri, such payments made as aforesaid could not be recovered back even though the orders of the Commission requiring such payments to be made had been set aside by that body, this because of a holding by such court that such payments, suit not having been brought to enforce the award of damages or orders of the Commission, were voluntary, made with the full knowledge of the facts and could not be recovered.

The holding by the Supreme Court of Missouri that money paid pursuant to an order of the Interstate Commerce Com-

mission entered under the provisions of said Section 16 of the Interstate Commerce Act may not be recovered back though such orders had been set aside by the Commission is an erroneous construction of a Federal statute and a denial to petitioners of a right or immunity which petitioners have under the laws of the United States and especially said Section 16 of the Interstate Commerce Act.

It is the contention of petitioners that payments of awards of reparation pursuant to orders of the Interstate Commerce Commission entered in accordance with the provisions of said Section 16 are involuntary, notwithstanding suits have not been brought to enforce such orders, and that amounts so paid may be recovered back if the Commission thereafter sets aside such findings and orders, and that said Section 16 should be so construed.

6. The statutory provision under which jurisdiction is invoked:

Section 237(b), Judicial Code (Title 28, Sec. 344, U. S. Code).

7. Cases sustaining the jurisdiction of this Court:

St. L., I. M. & S. v. *Taylor*, 210 U. S. 281, 293, 28 S. Ct. 216, 52 L. Ed. 348;

Southern Railway v. *Crockett*, 234 U. S. 725, 730, 34 S. Ct. 897, 58 L. Ed. 1564;

St. L., I. M. & S. v. *McWhirter*, 229 U. S. 265, 275, 33 S. Ct. 84, 58 L. Ed. 192.

Statement of the Case.

A full statement of the case has been given in the petition and, in the interest of brevity, such statement is not repeated at this point.

Specification of Errors.

1. The court below erred in holding that the payment of the award of damages in question pursuant to orders of

the Interstate Commerce Commission entered in accordance with Section 16 of the Interstate Commerce Act, suit not having been brought to enforce such orders, was voluntary, made with full knowledge of all of the facts and that the amount paid could not be recovered back though such an award of damages and orders requiring the payment thereof had been set aside and vacated by the Commission.

2. The court below erred in holding that the payment of the award of damages in question was a voluntary payment and not a payment made under a mistake of fact.

3. The court below erred in holding that since in the opinion of the court the payment of the award of damages was voluntary and made with full knowledge of all of the facts and without fraud or duress, it would be inequitable to require respondent to refund the amount so paid because the status of respondent had changed since the payment of the award and could not be restored.

ARGUMENT.

I.

Payment to the Respondent of the Amount Sued for Was Not Voluntary and May be Recovered Back.

The Interstate Commerce Act requires a rail carrier to apply to the transportation service rendered by it reasonable rates and an assessment by such carrier of a rate unreasonably high is a violation of Section 13 of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 13), which provides that complaint may be made to the Commission because of any violation of the Act by a rail carrier and that the Commission shall hear and determine such complaint and make whatever proper findings and orders the facts and the law justify.

Section 16 (U. S. Code, Title 49, Sec. 16) of the Interstate Commerce Act provides that if after hearing on complaint

as provided in said Section 13, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of the Act for violation thereof the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Paragraph 2 of said Section 16 provides that if a carrier does not comply with an order for the payment of money within the time limit of such order, the complainant may file in the United States District Court or any other State court of general jurisdiction having jurisdiction of the parties, a petition setting forth the causes for which he claims damages and the order of the Commission in the premises. Such suit, if in a United States court, shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated and except that the petitioner shall not be liable for costs in such court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the suit.

It is the view of petitioners that it is for the Federal courts to determine whether payments made in accordance with the provisions of such sections 13 and 16 of the Interstate Commerce Act of awards of damages pursuant to orders entered by the Commission are voluntary, unless suit shall have been brought to enforce the payment of such awards.

The determination of that question necessarily involves the construction to be given to such statutes.

The lower court held such a payment to be voluntary, stating:

> "The reparation award made by the Commission is not a judgment and the Commission could not have

enforced its payment. The Interstate Commerce Act provides that if a carrier does not pay the award within the time fixed in the Commission's order, the shipper may bring a suit against the carrier in a court of competent jurisdiction to recover damages because of the unreasonable charges exacted, and in such suit the order of the Commission shall be *prima facie* evidence of the facts stated in such order.

"The carrier could have refused to pay the award made by the Commission and awaited a suit by the shipper, in which suit it could have invoked every defense which the law afforded it. It did not take that course, but on the contrary paid the award in full before filing its motion for rehearing with the Commission. Such payment was voluntarily made with full knowledge of the facts and without fraud or duress. One who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud and duress, cannot recover it back."

The court below seemingly fails to give effect to the fact that had the respondent instituted suit to collect the award of damages in question, the carrier could not have again tried out the reasonableness of the rates assailed. The following cases declare this rule:

South Carolina Asparagus Assn. v. *Southern Railway,* 64 F. (2d) 419;

Mitchell Coal & Coke Co. v. *P. R. R. Co.,* 230 U. S. 247, 258;

United States v. *L. & N. R. Co.,* 235 U. S. 314.

In the *Mitchell Coal & Coke Company* case, *supra,* this Court said:

"Such orders, so far as they are administrative, are conclusive whether they relate to past or present rates and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial

and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by paragraph 16 of the Act given its day in court and the right to a judicial hearing."

Also, in the case of *Virginian Railway Co.* v. *United States,* 272 U. S. 659, syllabus 4, to the opinion is as follows:

"A finding of the Commission that a rate is unreasonable, is binding on this Court, when supported by evidence, without regard to the soundness of the Commission's reasoning and conclusions or their consistency with findings in other proceedings."

A carrier can, when suit is brought to enforce an award of damages by the shipper, invoke as defenses (a) lack of testimony to support the finding and order of the Commission, (b) the fact and amount of damages, and (c) the question of confiscation, but if the finding of the Commission is supported by testimony that the shipper has been damaged and the rates fixed are not confiscatory, the carrier has no other recourse than to pay the award.

The court below finds that the carrier voluntarily paid the award in full before filing its motion for rehearing with the Commission and without hint or suggestion to respondent that the matter would be further litigated.

The facts are these as established by the record. The representative of respondent, B. V. Forrester, called upon the carrier at its headquarters in St. Louis before the expiration of the time in which a motion for rehearing could be filed with the Commission and demanded payment of the award of damages (R. 87). His exact testimony is as follows:

"I told him I wanted to discuss the reparation case with him; that there was an order for the reparation to be paid, and the time was fast approaching when this

must be paid and we had decided on some action. Of course, we had dropped the matter for seven years.

Q. Did you tell him what you were going to do if they would not pay?

A. Well, that was understood.

Q. What was the understanding?

A. They knew that we had only one recourse if they did not voluntarily pay the reparation." (R. 89.)

The foregoing constitutes on the part of the respondent a demand for payment under an implied threat to sue.

It is a fair inference from such testimony that inasmuch as the *Scott County Milling Company* case had been twice heard by the Commission and had culminated in awards of damages against the carriers, that it was the opinion of the respondent that it was safe in demanding this money, that it could rely upon what the Commission had done and that the carrier could be safely left to whatever course it elected to pursue.

There is no hint or suggestion in the record that the carrier in anywise intimated that it would not continue to pursue what remedies were available to it. Looking at the facts from a practical standpoint the carrier was in this position; the award of reparation was in a large amount, a substantial attorney's fee would have to be paid if suit were brought resulting in the enforcement of the award, together with costs, and the case having been tried twice before the Commission, the carrier could not assert that the orders entered by the Commission were not supported by testimony or that the respondent had not paid and borne the freight charges. The defense of confiscation is one that is rarely available in cases of awards of damages by the Commission. The respondent was threatening to sue, was demanding its money, and the carrier elected to pay, save the attorney's fees and costs, and rely upon having the award set aside through further resort to the Commis-

sion. Nothing the carrier said or did could properly give rise to an inference that the transaction was closed in so far as the carrier was concerned.

In view of the foregoing, the principles announced by this Court in the case of *Atchison, etc., R. Co.* v. *O'Connor*, 223 U. S. 280, are peculiarly applicable. That case was an action to recover taxes paid, and the Court said:

> "But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. *He is entitled to assert his supposed right on reasonably equal terms.*" (Emphasis supplied.)

This Court in the case of *St. L. & S. F. R. R.* v. *Spiller*, 275 U. S. 156, 159, in discussing the penalties the statute prescribed against a carrier that resisted payment of an award of reparation, said:

> "The purpose of Congress in making the provision concerning costs was to discourage harassing resistance by a carrier to a reparation order."

Looking at the facts surrounding the situation at the time the payment of the award in question was demanded by the respondent, it is obvious that the carrier was without a substantial defense and that the failure to pay would have resulted in the penalties of the statutes. The carrier was not in a position to assert his supposed rights upon reasonably equal terms.

II.

Payment of the Award in Question Was Made Under a Mistake of Fact Because the Question of Whether a Rate is Reasonable or Unreasonable is a Question of Fact.

The reasonableness or unreasonableness of a rate charged by a railroad company is a question of fact and not of law. The following cases establish that doctrine.

Illinois Central R. R. Co. v. *I. C. C.*, 206 U. S. 451, 51 L. Ed. 1128, 27 Sup. Ct. 700;

Northern Pacific Rwy. Co. v. *Solum*, 247 U. S. 478, 483;

Penn. R. R. Co. v. *International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446.

In the *International Coal Mining Company* case, *supra*, this Court said:

> "For the reasonableness of rates, and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts."

The court below in considering this contention stated

> "A mistaken belief of the parties that the finding of the Commission was either right or wrong would not be a mutual mistake of fact. A mutual mistake of fact as that term is used in the law, means in this case a mutual mistake as to the existence or non-existence of facts determinative of the reasonableness or unreasonableness of the rate."

The foregoing is simply a holding that a mutual mistake as to the existence or non-existence of facts means lack of knowledge of what the testimony is or could be in a proceeding before the Commission.

The very purpose of that testimony is to enable the Commission to determine as a fact whether the rates assailed are reasonable or unreasonable. In so far as this proceeding is concerned, the Commission did determine that fact, to wit, that the rates were unreasonable. All of the parties to the controversy acted upon that finding. After such action had been taken the Commission was of the opinion that its finding of fact as to the reasonableness of the rates was erroneous and set aside such finding. Petitioners contend that payment of the award of damages by the carrier was because of an erroneous finding by the Commission of a fact, which finding the Commission thereafter set aside, and that a payment made under such circumstances is a payment made under a mutual mistake of fact.

III.

The Amount Sued for Having Been Paid Under a Mutual Mistake of Fact Growing Out of Findings and Orders of the Commission Pursuant to the Provisions of Sections 13 and 16 of the Interstate Commerce Act, Respondent Has Received Money Which in Equity and in Good Conscience It Should Pay to Petitioners.

Whether or not it would be equitable for respondent to retain the money paid to it in satisfaction of the award of reparation in question depends upon the construction placed upon the statute pursuant to the provisions of which the money was paid.

It is the view of petitioners that not only was such payment involuntary, but was also under a mutual mistake of fact and that a proper construction of the statute in question is that money paid in satisfaction of an award of damages and orders to pay such damages entered thereunder are paid under a mutual mistake of fact if such awards and orders are thereafter set aside by the Commission as

having been erroneous. The court below held that it would be inequitable to compel respondent to return the money because, in the opinion of the court, the payment of the award of reparation was voluntary and that the respondent was caused to believe that the litigation was ended and hence changed its status. We have heretofore discussed this question of inducing the respondent to believe the litigation was ended and we shall make no further reference to that feature. The attention of the court, however, is called to the case of *Bull* v. *United States*, 295 U. S. 247. That case involved a proceeding for the collection of an estate tax, the United States through a mistake having taken more than it was entitled to. This Court held that the retention of the money was against morality and conscience. But since claim for refund or credit was not presented or action instituted for restoration within the period fixed by the Statute of Limitations, if nothing further had occurred, Congressional action would have been the sole avenue of redress. The following principle was declared by this Court in that case:

> "An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. In these cases (cited in the opinion) and many others that might be cited the rules of law applicable to individuals were applied to the United States."

The money here sued for, while taken without any element of fraud, unquestionably belongs to petitioners, and the unjust retention of such money by the respondent unquestionably amounts in law to fraud on the rights of petitioners, and it will be observed that this Court in applying the principles here contended for asserted that if the respondent is obliged by natural justice and equity to refund,

the form of the indebtedness or the mode in which it occurred is immaterial.

The money sued for was paid in compliance with orders entered by the Interstate Commerce Commission in accordance with the provisions of a Federal statute to which we have heretofore particularly referred. In the opinion of petitioners a fair and correct interpretation of that statute is that payments made pursuant to orders thereafter set aside may be recovered and that it would be inequitable to permit those receiving the money to retain that which is unquestionably the property of others.

IV.

A Holding That Petitioners are Entitled to Recover the Money Sued for Would be in Accord With the Purposes of the Interstate Commerce Act.

The Commission in its reports dated July 12, 1926, and July 10, 1928, found that respondent had been assessed rates unreasonable for the past and that respondent was entitled to an award of damages, and by orders entered February 11, and March 11, 1929, directed the payment of such award, which was done. In its report dated July 3, 1933, the Commission found that its previous findings were erroneous, that respondent had not been subjected to the payment of unreasonable rates for the past and was not entitled to an award of damages. In accordance with such last named findings all previous reports and orders were vacated.

The situation left in effect by reason of the report and orders of the Commission dated July 3, 1933, was that the respondent had paid for the past reasonable rates the same as had other shippers similarly situated. Respondent, however, had not only been assessed reasonable rates, but through erroneous orders of the Commission had been

paid the sum of $23,994.33. This money, the Supreme Court of Missouri holds respondent is entitled to retain because the carrier did not require as condition precedent suit to be brought to recover such amount, interposing what might fairly be termed paper defenses and subject itself to the penalties of the statute.

In the opinion of petitioners, in construing section 16 of the Interstate Commerce Act consideration should be given to the general purpose of the entire Act.

In the case of *Louisville & N. R. Co.* v. *Mottley,* 219 U. S. 467, 55 L. Ed. 297, this Court held that the purpose of Congress in passing the Interstate Commerce Act was to cut up by the roots every form of discrimination, favoritism and inequality.

The purpose of such Act cannot be effectuated by permitting a shipper that has been charged reasonable rates to receive in addition a large sum of money because of an erroneous decision thereafter set aside of the Commission.

Conclusion.

It is, therefore, respectfully submitted that this cause is one calling for the exercise by this Court of its supervisory powers in order that the errors of the lower court be corrected and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Missouri and finally reverse it.

THOMAS J. COLE,
RUSSELL L. DEARMONT,
H. H. LARIMORE,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 650.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of Missouri Pacific Railroad Company, a Corporation, *Petitioners,*

v.

SCOTT COUNTY MILLING COMPANY, a Corporation.

PETITIONERS' REPLY BRIEF.

H. H. LARIMORE,
Counsel for Petitioners.

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v.

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PETITIONERS' REPLY BRIEF.

COMMENTS ON RESPONDENT'S STATEMENT AS TO JURISDICTION.

Respondent in discussing the jurisdiction of this Court to review the judgment of the Supreme Court of Missouri makes the point that the decision in question rested in part on non-federal grounds broad enough to support the judgment of the Missouri Court.

The Supreme Court of Missouri was required to pass upon the defense interposed by respondent that the payment of the money sought to be recovered was voluntary. This involved a construction of Section 16 of the Interstate

Commerce Act (U. S. Code, Title 49, Section 16). The Court construed said Section 16—and held the payment voluntary.

It then proceeded to hold that by reason of such *voluntary* payment petitioners had led respondent to believe that the litigation was ended and that respondent could safely pay its traffic counsel.

It will thus be seen that the entire decision of the Supreme Court of Missouri rested upon its finding that the payment made was voluntary.

Had that Court held that the payment in question was involuntary, as contended by petitioners, there would have been no room in the case for the doctrine of estoppel or changed condition. This is elementary.

In addition to the foregoing, petitioners contend that in order to prevent unjust discrimination, favoritism and inequality, forbidden by the Interstate Commerce Act, they are entitled to recover the amounts paid. This is a Federal question, in the decision of which no consideration can be given to any state rule of estoppel or changed condition.

COMMENT ON STATEMENT OF CASE BY RESPONDENT.

Respondent calls the action one for money had and received. An examination of the petition (R. 5) shows that petitioners alleged, in substance, that respondent prosecuted a suit before the Interstate Commerce Commission, and, obtained an award of damages against Missouri Pacific Railroad Company and others—which upon respondent's demand was paid. Thereafter, the Commission held its action to have been in error, and set aside such award, whereupon petitioners demanded the return of the money paid, and upon respondent's refusal to return brought suit to recover it.

Respondent refers to the fact that the award was paid in April, 1929, and that return of the money was not de-

manded until October 30, 1934 (R. 109). It does not state to this Court that the award in question was not set aside by the Commission until July 3, 1933, and that the hands of the carrier were tied until the award had been vacated (R. 50).

COMMENT ON ARGUMENT OF RESPONDENT.

The argument of respondent commencing at page 6 of its brief on the question of jurisdiction, will be only briefly referred to, as we have heretofore discussed the question of jurisdiction.

Respondent at page 6 of its brief states that the Supreme Court of Missouri holds "(1) that the payments made were voluntary, and (2) that the payments were made under circumstances which estopped petitioners from recovering, and that under the facts it would be inequitable and unjust to require the defendant to pay the money to petitioners."

The foregoing is inadvertently inaccurate. The Supreme Court of Missouri did not make two findings, one to the effect that the payments were voluntary and another to the effect that without regard to whether the payments were voluntary or involuntary petitioners were estopped from recovering them.

The Missouri Court held the payments voluntary and applied the doctrine of estoppel because it found they were *voluntary*.

Also at page 6 of its brief respondent argues that what constitutes a voluntary payment is a matter of general law and cites some Missouri decisions.

It is obvious that whatever legal principle this Court may invoke, a determination of the question here presented involves the construction of Section 16 of the Interstate Commerce Act, and the best that can be said for a Missouri decision is that it might be persuasive.

At page 7 of its brief respondent refers to what it calls "the second ground" on which the lower Court based its decision, again discussing the question of estoppel.

In the interest of accuracy we state there is no "second ground". As shown by the excerpt from the opinion of the lower Court appearing on said page 7 of respondent's brief, the Supreme Court of Missouri held that by reason of its prior finding that the payments were *voluntary*, the doctrine of estoppel applied.

At page 15 of respondent's brief it is stated in substance that the opinion of the lower court would lead to the conclusion that the Court's decision was primarily based on the proposition that the "circumstances" were such as to estop the petitioners from recovering. The "circumstances" referred to are that the Court found that the payments were voluntary, and that by reason of such voluntary payment petitioners are estopped.

If such payments are not voluntary, then the "circumstances" disappear from the case.

Respondent makes no reference to the point made by petitioners at page 19 of their brief, to the effect that a holding that petitioners are entitled to recover the money sued for would be in accord with the purposes of the Interstate Commerce Act. Also since respondent paid rates found reasonable by the Commission, the retention by respondent of a large sum of money in addition thereto would violate the real purpose of the Act.

Respectfully submitted,

H. H. LARIMORE,
Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 650.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of MISSOURI PACIFIC RAILROAD COMPANY, a Corporation;

Petitioners,

v.

SCOTT COUNTY MILLING COMPANY, a Corporation.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONERS' SUPPLEMENTAL BRIEF.

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Of Counsel:
RUSSELL L. DEARMONT,
THOS. J. COLE.

Petition for certiorari filed February 6, 1939. Certiorari granted March 13, 1939.

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PETITIONERS' SUPPLEMENTAL BRIEF.

JURISDICTION.

At pages 8 and 9 of brief of petitioners in support of application for writ of certiorari there was discussed the question of jurisdiction.

At page 6 in its brief in opposition to petition for writ of certiorari respondent makes the point that what constitutes a voluntary payment is a matter of general law and does not necessarily depend upon the construction of Section 16 of the Interstate Commerce Act (United States Code, Title 49, Section 16).

This contention is followed by the argument that this Court is without jurisdiction because of a finding by the Supreme Court of Missouri that petitioners were estopped by payment of the award of damages.

A somewhat similar contention was made in the case of **Union Pacific Railroad Company v. Public Service Commission of Missouri**, 248 U. S. 67.

That case involved the validity of a charge made by the Public Service Commission of Missouri for a certificate authorizing the issue of bonds secured by a mortgage on the whole line of the Union Pacific Railroad. The Missouri Commission had granted the authority and charged a fee therefor. The Railroad Company accepted the grant as required by its terms, but protested against the charge as an unconstitutional interference with interstate commerce. On appeal to the Supreme Court of Missouri, that Court, while holding that the charge was unreasonable, held the railroad estopped by its application to the Missouri Commission. When the case came to this Court it was held that the charge as made was an unlawful interference with commerce among the states, and touching the opinion of the Supreme Court of Missouri this Court said:

> "The Supreme Court of the State avoided this question by holding that the application to the Commission was voluntary and hence that the Railroad Company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this Court. But the later decisions show that such is not the law, and that on the contrary it is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived. **Creswill v. Knights of Pythias**, 225 U.

S. 246. Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in **Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor**, 223 U. S. 280."

If the law were otherwise than as declared in the foregoing excerpt, the right of a citizen under a federal statute could, in the case of payments of money, be entirely defeated by a holding on the part of a state court that such payments were voluntary or made under circumstances as to render applicable the law of estoppel.

Attention is also called to the decision by this Court in the case of **Adam v. Saenger**, 303 U. S. 159, in which this Court, in discussing the existence of a claimed federal right turning on the meaning and effect of a California statute as construed by a Texas court, said:

"While this Court re-examines such an issue with deference after its determination by a state court, it cannot, if the laws and Constitution of the United States are to be observed, accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right. This is especially the case where the decision is rested, not on local law or matters of fact of the usual type, which are peculiarly within the cognizance of the local courts, but upon the law of another state, as readily determined here as in a state court."

PAYMENT OF THE AMOUNT SUED FOR WAS NOT VOLUNTARY.

Under point I and at page 10 of brief of petitioners in support of petition for writ of certiorari, there is discussed the question of whether payments of the amount sued for were voluntary.

It is the view of petitioners that the question of whether such payments were voluntary or involuntary is outside of the issues, but since respondent asserts as a defense that such payments were voluntary, we again refer to the case of **Union Pacific R. R. Co. v. Public Service Commission of Missouri**, supra, and to that part of the Court's opinion which is as follows:

> "On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The Railroad Company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the Company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called. **The Eliza Lines**, 199 U. S. 119, 130, 131. If, as may be, the Supreme Court of the State regards or will regard this statute as inapplicable, **Public Service Commission v. Union Pacific R. R. Co.**, 271 Missouri 258, probably the State would not wish to retain the charge, but we repeat, the Railroad Company was not bound to take the risk of the decision, and no proceeding has been pointed out to us by which it adequately could have avoided evils that made it practically impossible not to comply with the terms of the law, **Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor**, 223 U. S. 280, 286."

Also, in discussing further the question of whether the payments involved were voluntary it should be stated that the supplemental order of the Commission awarding reparation was dated March 11, 1929 (R. 25); that payment of

the award was made on the demand of respondent, at various dates between April 4 and April 19, 1929; that under the rules of the Commission a petition for rehearing that part of any case relating to reparation must be filed within sixty days after service of report therein (R. 29); and that on the 25th day of April, 1929, within said sixty days, a petition for rehearing was filed (R. 26).

It thus appears that respondent elected to demand and receive payment before the expiration of the said sixty days with no assurance, express or implied, from petitioners that petition for rehearing would not be filed with the Commission.

RECOVERY BY PETITIONERS WOULD BE IN ACCORD WITH THE PURPOSES OF THE INTERSTATE COMMERCE ACT.

Under heading numbered IV., and at page 19 of petitioners' brief in support of petition for writ of certiorari, the point is made that a holding that petitioners are entitled to recover the money sued for would be in accord with the purposes of the Interstate Commerce Act.

In support of that position petitioners cited the case of **Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297,** in which this Court held that the purpose of Congress in passing the Interstate Commerce Act was to cut up by the roots every form of discrimination, favoritism and inequality.

In further support of the point that a recovery of the money sued for would be in accord with the purposes of the Interstate Commerce Act, we cite the case of **A. J. Phillips Company v. Grand Trunk Western Railway Company, 236 U. S. 662.**

In the case cited there was an attempt to recover damages by way of reparation through a suit brought four years after the plaintiff's cause of action arose and after the federal Statute of Limitations had run against the claim.

It was argued in the case cited that, since there was interposed a general demurrer to the declaration, the Michigan practice should apply, but this Court said:

> "But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years **and not after.** Under such a statute the lapse of time not only bars the remedy but destroys the liability. (Finn v. United States, 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances, must be borne in mind in construing the Commerce Act. This obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different States, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished. The prohibitions of the

statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appears that the complaint had not been filed within the time required by the statute it was evident, as a matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action."

The reasoning of the **Phillips case**, supra, is particularly applicable to the facts of the instant case. Conceivably, several shippers might join in a complaint before the Interstate Commerce Commission seeking awards of damages and the Commission might award damages in favor of each of such complainants against the carrier. The latter, desiring to prefer one shipper over another, might pay to the favored shipper the award of the Commission and decline to pay the others. After such payment the carrier might secure, at the hands of the Commission, a reversal of its previous findings, in which case the shipper receiving payment would unquestionably enjoy a preference over those not paid if the opinion of the Supreme Court of Missouri that such payment could not be recovered back is correct.

To permit the shipper paid by the carrier to retain the payment, notwithstanding the award entered by the Commission had been set aside, in face of the fact that the carrier would not be required to pay other shippers similarly situated because such award had been vacated, would open the door to discrimination and preference

which the Interstate Commerce Act is particularly designed to prevent.

Respectfully submitted,

H. H. LARIMORE,
Counsel for Petitioners.

Of Counsel:

RUSSELL L. DEARMONT,
THOS. J. COLE.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 650.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Petitioners,

v.

SCOTT COUNTY MILLING COMPANY, a Corporation.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF OF PETITIONERS IN REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF.

H. H. LARIMORE,
Counsel for Petitioners.

Of Counsel:
RUSSELL L. DEARMONT,
THOS. J. COLE.

Petition for certiorari filed February 6, 1939.
granted March 13, 1939.

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IN THE

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On Writ of Certiorari to the Supreme Court of the State of Missouri.

BRIEF OF PETITIONERS IN REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF.

COMMENTS ON THE DISCUSSION BY RESPONDENT ON THE QUESTION OF JURISDICTION.

Respondent, commencing at page 1 of its supplemental brief, discusses the question of the jurisdiction of this Court and makes the point that the decision of the Supreme Court of Missouri was based in part on nonfederal questions broad enough to maintain the judgment.

And at page 7 of such supplemental brief the following statement is made:

> "The state court decision rested not alone on the question of the payments being voluntary, but the decision rested on the further question as to whether or not under the circumstances as shown by the record in this case it would be inequitable to require the respondent to repay the money it had received."

An examination of the decision of the Supreme Court of Missouri establishes the fact that every conclusion reached by that Court was based on a finding that payment of the award of damages by petitioners was voluntary. In order to reach the conclusion that such payment was voluntary the Missouri Court was compelled to construe, and did construe, Section 16 of the Interstate Commerce Act (Title 49, U. S. C. A.) (R. 103, 104). The lower court stated (R. 109):

> "The effect of the carrier's act in **voluntarily** paying the award under the circumstances shown, was to treat the matter as a closed transaction, and cause respondent to believe that the litigation was ended." (Emphasis supplied.)

In fact, it clearly appears from the decision of the Supreme Court of Missouri that that Court was of the opinion that the action of the carrier in (as found by that Court) voluntarily paying the award induced respondent to change its position so that it could not be placed in statu quo.

The question whether such payment was voluntary or involuntary (if material to this proceeding) is for this Court to decide; but we make the point that the Missouri Court did not, either directly or by inference, hold that without regard to whether the payment in question was voluntary or involuntary, it would be inequitable to require the restoration of the money.

Commencing at page 9 of its supplemental brief, respondent, relying on the case of Garr, Scott and Company v. Shannon, 223 U. S. 468, 56 L. Ed. 510, contends that the record in this case shows that the questions of voluntary payment and estoppel fairly arose out of the record and were not arbitrarily injected into the case. In support of that contention respondent sets out certain portions of its answer in which it pleaded certain facts relied upon to show that the payment was voluntary and that petitioners were estopped to recover the same.

This contention overlooks the fact that from the very beginning to the end of this case there is involved a proper construction of a federal statute and if a construction of that statute is required in order to decide the issues, the doctrine declared in the case last cited is not material.

COMMENT ON THE CONTENTION OF RESPONDENT THAT PAYMENT WAS VOLUNTARY.

Respondent in its supplemental brief again discusses, at page 12, the question of whether the amount sued for was a voluntary payment, and, while we are convinced that in order to decide the issues it is not necessary to determine whether the payment made was voluntary or involuntary, nevertheless, we submit the following as indicating that such payment was in fact involuntary:

(1) Respondent had secured from the Interstate Commerce Commission an award of damages and an order requiring the carriers to pay such an award within a specified period.

(2) The case had been twice heard by the Interstate Commerce Commission upon an exhaustive record.

(3) Respondent was demanding payment of the award and had decided upon immediate action (R. 89).

(4) Suit by respondent and recovery of the damages in question meant payment by the carriers of attorneys' fees and costs.

(5) In such suit the findings and order of the Commission would be prima facie evidence of the facts therein stated.

(6) In any suit on an award of damages by the Commission the only defenses open to the carriers are (a) that the order is unsupported by testimony, (b) that the shipper has sustained no damage, and (c) that the order of the Commission, if enforced, would result in confiscation.

(7) The carriers could not in a suit by a shipper to collect an award of damages made by the Commission go into the question of the reasonableness or unreasonableness of the rates involved.

(8) It is not urged in this case that the findings and order of the Commission involved were unsupported by testimony, that respondent had in fact sustained no damages, or that the rates ordered in could have been shown to have been confiscatory.

While naming no defense that the carrier could have made, had a suit been instituted to collect the award of damages entered by the Commission, the respondent asserts that, nevertheless, the carrier should have refused to pay and forced respondent to sue.

The Supreme Court of Missouri, while also stating no defense that the carrier could have urged, declares the general doctrine:

> "An order of the Commission which violates the constitutional rights of a carrier, or is based upon a finding without evidence or upon evidence which does not support it, is not conclusive on the courts and cannot stand if properly assailed."

The above doctrine is correct, but nowhere in its opinion does the Missouri Court show how such doctrine could have been applied to the facts of this case (R. 105). It asserts (R. 106) that the federal statute cuts off no defense, interposes no obstacle to a full contestation of all the issues and takes no question of fact from either court or jury, but it neglects to say what defense, if any, the carrier could have successfully urged if suit had been brought upon the award.

The lower court also stated in its opinion (R. 107):

> "The carrier could have refused to pay the award made by the Commission and awaited a suit by the shipper, in which suit it could have invoked every defense which the law afforded it. It did not take that course, but on the contrary paid the award in full before filing its motion for rehearing with the Commission."

In the foregoing it is not asserted that any defense that might be available in a given case was available in this instance. In other words, the position of the state court and of the respondent is that notwithstanding the fact the carrier was defenseless, the latter should have permitted suit to have been brought against it and incurred the penalty of the statute or else be charged with having made a voluntary payment.

The state court held also that the payment in question was not made under a mutual mistake of facts (R. 108), and we assume that the effect of its opinion is that the payment was made under a mistake of law. A mistake of law happens when a person having full knowledge of the facts comes to an erroneous conclusion as to their legal effect. Mowatt v. Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508. It certainly does not appear that the carrier when it paid the award in question had come to any erro-

neous conclusion as to the legal effect of the facts. Respondent, however, in its answer seems to take that position. The carrier knew the legal effect of the facts as such facts then existed and hence paid the award, while the respondent urges that regardless of whether the carrier could have successfully contested the award in court, it should, nevertheless, have permitted itself to be sued or else the money paid could not be recovered.

Finally analyzed, the holding of the state court and the position of respondent are identical in that they both assert that because as an abstract proposition certain defenses could be made to a suit to enforce an award of damages entered by the Commission when circumstances warranted, without regard to whether the circumstances warranted such action in this case, the carrier should, nevertheless, have awaited a judgment before paying the award, and, not having done so, must be held to have made a voluntary payment with full knowledge of the facts.

COMMENT ON THE STATEMENT OF RESPONDENT THAT THE PURPOSE OF THE INTERSTATE COMMERCE ACT DOES NOT MAKE NECESSARY RECOVERY BY PETITIONERS.

In discussing the question of whether a recovery by petitioners would be in accord with the purpose of the Interstate Commerce Act, respondent makes the point that the fact that one shipper pursued his remedy and another did not, does not amount to the discrimination, favoritism and inequality sought to be eradicated by the Interstate Commerce Act. It also makes the point that if one shipper brings suit within a year, and another shipper does not, it results in an inequality.

The foregoing argument overlooks the fact that the purpose of the Interstate Commerce Act was to regulate

the conduct of the carrier rather than the shipper and that the discrimination, favoritism and inequality condemned by the act are those practiced or which might be practiced by the carrier. It is one thing for a shipper to neglect to assert his legal rights and another and different thing for a carrier to be placed in a position where, by action on its part, one shipper can be preferred and another discriminated against.

It is undoubtedly the intent of the Interstate Commerce Act that a carrier shall not be in a position where, by forcing one shipper to sue upon an award of reparation while paying another shipper similarly situated upon demand, can enable the latter to keep the money paid him, while the former, because of action taken by the Commission, is denied recovery of any part of the award.

CONCLUSION.

This suit is brought upon the theory that the money in question having been paid by the carrier obedient to an order of the Interstate Commerce Commission can be recovered, since the order in question has been set aside and a finding entered that the rates involved, when assessed, were not unreasonable, that the respondent had not sustained damages and was not entitled to recover any sum from the carriers.

It is also the position of petitioners that a determination of the question of whether the money paid was paid voluntarily or involuntarily is not necessary to a determination of this case.

Petitioners also contend that since respondent paid rates found reasonable by the Commission when assessed, the same as other shippers similarly situated, and since by reason of the payment of the money sued for, respondent, in addition to having paid reasonable rates the same as

paid by other shippers, has received from the carrier a large sum of money, to permit the respondent to retain such money would be to force the carrier to involuntarily rebate a shipper. In this connection we refer to the recent case of **Lowden v. Simonds-Shields-Lonsdale Grain Co.**, Law. ed. Advance Opinions, Vol. 83, page 610, decided by this Court March 27, 1939, in which the following holding appears:

> "This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. **Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.**" (Emphasis supplied.)

In our opinion the rule declared in the case last cited is particularly applicable to the facts of the instant case and that a recovery by petitioners would, as stated by us in our brief in support of petition for writ of certiorari, be in full accord with the purposes of the Interstate Commerce Act.

Respectfully submitted,

H. H. LARIMORE,
Counsel for Petitioners.

Of Counsel:

RUSSELL L. DEARMONT,
THOS. J. COLE.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 650.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of Missouri Pacific Railroad Company, a Corporation,
Petitioners,

v.

SCOTT COUNTY MILLING COMPANY, a Corporation.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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III. The Supreme Court of Missouri held that payment of the award in question without waiting for suit to be brought thereon was not a payment made under a mistake of fact, but was a payment voluntarily made with a full knowledge of all of the facts and could not be recovered by petitioners, though the award in question had been set aside by the Commission 14

IV. The Supreme Court of Missouri held that since in its opinion the payment of the award in question was voluntary, such payment caused respondent to believe that the matter was a closed transaction and that it would be inequitable to require respondent to refund the amount so paid, even though the Commission had set aside the award of reparation in question and all orders requiring the payment thereof, because the respondent could not now be placed in statu quo 15

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 650.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of Missouri Pacific Railroad Company, a Corporation,
Petitioners,

v.

SCOTT COUNTY MILLING COMPANY, a Corporation.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

Respondent is of the opinion that petitioners' petition and brief do not disclose jurisdiction in this Court to review the judgment of the Supreme Court of Missouri in this case.

It is conceded by respondent that the judgment in this cause by the Supreme Court of Missouri was a judgment by the court of last resort of that state and that timely application for the writ herein was made by petitioners.

The petition herein does not disclose that the decision of the Supreme Court of Missouri was based solely on a federal question, but, on the contrary, we are of the opinion that the petition filed herein and the opinion of the Supreme Court of Missouri show that the decision of the Supreme Court of Missouri rested in part on nonfederal grounds broad enough to support that Court's judgment.

In the suit brought by petitioners in the state court they sought to recover from defendant in an action for money had and received (R. 5-10), and the defendant's answer (R. 11-20), among other defenses, pleaded (1) voluntary payment and (2) payment under circumstances which estopped petitioners from recovering the money so paid, and that under the facts it would be inequitable and unjust to require defendant to repay the money to the petitioners.

The opinion of the Supreme Court of Missouri held (1) that the payment was a voluntary payment, and (2) that the circumstances under which petitioners paid respondent were such as to induce respondent to believe the litigation had terminated and induced it to pay its representative his fee of 50 per cent of the amount recovered, to pay the balance in dividends and use it for corporate purposes, and that since it could not recover back such money because of the Statute of Limitations its condition was so changed that it would be against equity and good conscience to require it to repay the money.

Cases denying the jurisdiction of this Court:

Arkansas Southern Railroad Company v. German National Bank, 207 U. S. 270, 28 S. Ct. 78, 52 L. Ed. 201;

Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U. S. 157, 37 S. Ct. 318, 61 L. Ed. 644;

Municipal Securities Corporation v. Kansas City, 246 U. S. 63, 38 S. Ct. 224, 62 L. Ed. 579.

STATEMENT OF CASE.

The respondent submits the following as supplementing petitioners' summary statement of the matter involved:

After the order of the Commission for the payment of reparation, a representative of the respondent called on Mr. Perkins, vice-president of the Missouri Pacific Railroad Company, and asked Mr. Perkins about the payment of the reparation. Mr. Perkins then inquired what the Frisco Railroad had done about it, and when informed that Mr. Kurn, the president of the Frisco Lines, had ordered the reparation paid, replied, "Well, whatever the Frisco has done, the Missouri Pacific will do likewise" (R. 88).

The payments were then made between April 4th and 19th (R. 26), and immediately thereafter 50 per cent of the amount received by respondent was paid to its traffic expert under contract of employment (R. 28, 29, 91).

The form of petitioners' action in the Scott County, Missouri, Circuit Court was one for money had and received (R. 6), and in their petition alleged:

> "* * * and because and on account of said Interstate Commerce Commission of the United States having jurisdiction of said cause and legal authority to make such reparation award and to enforce the same, and because said Missouri Pacific Railroad Company had no appeal therefrom, said Missouri Pacific Railroad Company, having no alternative, was required to and did pay to said defendant" (R. 9).

The case was tried upon an agreed statement of facts and depositions offered (R. 87-91), resulting in a judgment for respondent, and upon appeal the Supreme Court of Missouri affirmed the judgment of the lower court and by its opinion filed held that restitution would not be decreed under the facts in this case and held:

(1) That a reparation award is not a judgment and the Commission had no power to enforce its payment (R. 109);

(2) That the only method provided for enforcing payment is a suit for damages brought by the shipper against the carrier in a court of competent jurisdiction (R. 109);

(3) That the carrier did not await the bringing of suit in which it could have asserted its defenses, but, with full knowledge of all the facts and without fraud or duress, paid the award before filing its motion for rehearing, and without a hint or suggestion that the matter would be further litigated (R. 109);

(4) That the carrier's act in voluntarily paying the award, under the circumstances as shown, was to treat the matter as a closed transaction and cause the respondent to believe that the litigation was ended (R. 109);

(5) That respondent was under contract to pay its representative 50 per cent of the amount recovered from the carrier, and when the carrier voluntarily paid the award in full respondent treated it is a closed transaction and paid its representative 50 per cent of the award and used the balance for general corporate purposes, including paying dividends to stockholders (R. 109);

(6) That the carrier paid the award in April, 1929, and did not demand the return of the money until October 30, 1934 (R. 109);

(7) That if the respondent is required at this late date to repay the amount of the award to the carrier it would mean a loss of the sum paid its representative, since the Statute of Limitations would not be a complete bar to any claim respondent might assert against its representative for return of the money (R. 109);

(8) That the voluntary payment of the award prevented respondent from bringing suit for damages in a court of

competent jurisdiction within a year from the date of the award, wherein the rights of the parties could be judicially determined (R. 110);

(9) That these changed conditions were caused by the carrier's voluntary payment of the award and its long wait before demanding the return of the money, and that it would be against equity and good conscience and a rank injustice to require respondent to repay the amount of the award to the carrier, when the carrier's own act in voluntarily paying the award induced respondent to change its position so that it cannot now be placed in statu quo (R. 110).

ARGUMENT.

JURISDICTION.

The Judgment of the State Court Having Been Based in Part on Non-Federal Questions Broad Enough to Maintain the Judgment, This Court Is Without Jurisdiction.

The cases cited in petitioners' brief to sustain the jurisdiction of this Court are cases where the sole question involved was construction of a federal statute, and the decisions reviewed did not rest, either in whole or in part, on matters of general law.

Petitioner's original action was brought in the state court of Missouri to recover on a count for money had and received, and the defendant, among other defenses, pleaded voluntary payment, estoppel and changed condition.

The judgment of the Supreme Court of Missouri holds (1) that the payments made were voluntary, and (2) that the payments were made under circumstances which estopped petitioners from recovering, and that under the facts it would be inequitable and unjust to require the defendant to pay the money to petitioners.

It is respondent's view that what constitutes a voluntary payment is a matter of general law and does not necessarily depend upon the construction of Section 16 of the Interstate Commerce Act (United States Code, Title 49, Section 16). In Missouri the rule is firmly established that a payment is voluntary unless made under immediate necessity to redeem or preserve one's person or goods, and that a threat to sue does not constitute duress.

Claflin et al. v. McDonough, 33 Mo. 412;
Wolfe et al. v. Marshal et al., 52 Mo. 167;
State ex rel. Sandburn v. Stonestreet, 92 Mo. App. 214;

Pritchard v. Peoples Bank of Holcomb, 198 Mo. App. 597, 200 S. W. 665.

The second syllabus in Claflin v. McDonough, supra, illustrates the rule in Missouri:

> "Threat of legal process is not duress, for the party may plead and make proof that he is not liable. Where the collector demanded of the defendants the amount of the license tax due by them as merchants, and threatened that if they refused payment they should be prosecuted by indictment for dealing as merchants without license, and the defendants thereupon paid the sum demanded under protest in writing, the payment was voluntary, and not under duress."

The second ground on which the lower court based its judgment was that under the facts and circumstances as shown by the record in this case the petitioners are estopped from recovering because of having induced respondent to treat the matter as a closed transaction after it had paid the reparation. In the opinion of the Supreme Court of Missouri it is said (R. 109, 110):

> "The effect of the carrier's act in voluntarily paying the award under the circumstances shown was to treat the matter as a closed transaction, and cause respondent to believe that the litigation was ended.
>
> "Respondent was under contract to pay its representative fifty per cent of the amount recovered from the carrier. When the carrier voluntarily paid the award in full, respondent treated the case as a closed transaction and paid its representative ($11,997.16) fifty per cent of the award, and used the balance for its general corporate purposes, including payment of dividends to its stockholders. The carrier paid the award in April, 1929, and did not demand return of the money until October 30, 1934. If respondent were required, at this late date, to repay the amount of the award to the carrier, it would mean

a loss to respondent of the $11,997.16 which it paid to its representative, since the Statute of Limitations would now be a complete bar to any claim respondent might assert against its representative for the return of the money. Furthermore, respondent would be deprived of his statutory right to have some court determine the validity of its claim against the carrier, since the carrier's voluntary payment of the award prevented respondent from bringing a suit for damages in a court of competent jurisdiction, within one year from the date of the award, wherein the rights of the parties could have been judicially determined.

"The record justifies the conclusion that the carrier's voluntary payment of the award caused respondent to believe that the matter was a closed transaction, and induced it to act on that belief and thus alter its position by paying to its representative fifty per cent of the award. * * * These changed conditions were caused by the carrier's voluntary payment of the award, and its long wait thereafter before demanding return of the money so paid. It would be against equity and good conscience and a rank injustice to require respondent to repay the amount of the award to the carrier when the carrier's own act in voluntarily paying the award induced respondent to change its postion so that it cannot now be placed in statu quo."

It is respondent's view that the opinion of the Supreme Court of Missouri shows on its face that its judgment rests, at least in part, on a nonfederal question broad enough to sustain its judgment, and that under such circumstances this Court is without jurisdiction.

In Arkansas Southern Railroad Company v. German National Bank, 207 U. S. 270, 28 S. Ct. 78, 52 L. Ed. 201, the Court said:

"But, according to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a Federal question was neces-

sary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no Federal question, the same result must follow, as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. (Cases cited.) Therefore, if we should be of opinion, as we are, that the supreme court rested its judgment upon principles of common law as it understood them, we should go no farther, although that court also upheld and relied upon the statute, whether in our opinion, its views were right or wrong."

In Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U. S. 157, 37 S. Ct. 318, 61 L. Ed. 644, this Court, speaking on this question, said:

"Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the nonfederal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it. (Cases cited.) It has been so held in cases where the judgment was rested upon a federal ground and also upon an estoppel. (Cases cited.)"

I.

The Supreme Court of Missouri Held That the Payment of the Award of Reparation in Question to Respondent Pursuant to Orders of the Interstate Commerce Commission Entered in Accordance With the Provisions of Section 16 of the Act (U. S. Code, Title 49, Section 16), Without Suit Having Been Brought by the Respondent to Enforce Such Orders of the Commission, Was Voluntary and Could Not Be Recovered, Though Such Orders Had Thereafter Been Set Aside by the Commission.

The holding of the Missouri Supreme Court that a reparation award made by the Interstate Commerce Commission was not a judgment, and that such Commission could not enforce its payment, and that if the carrier did not pay the award the shipper may bring a suit against the carrier to recover damages, and that in such suit the order of the Commission should be prima facie evidence of the facts therein stated, and that in such suit it could invoke every defense which the law afforded it, is in harmony with the construction placed upon Section 16 of the Interstate Commerce Act (U. S. Code, Title 49, Section 16) by this Court.

In the case of Meeker v. Lehigh Valley Railroad Company, 236 U. S. 412, 35 S. Ct. 328, 59 L. Ed. 644, l. c. 657, it is said:

> "It is also urged, as it was in the courts below, that the provision in section 16 that, in actions like this, 'the findings and order of the Commission shall be prima facie evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.
>
> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no ob-

stacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in anywise work a denial of due process of law. In principle it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained."

The petitioners apparently contend that after the finding by the Interstate Commerce Commission a payment of reparation by the carrier is made under duress, and therefore the payment is not voluntary because of the limited character of defense the carrier could make in such action, provided there was evidence to support the finding and order of the Commission, and provided the rates fixed are not confiscatory. However, the record does not disclose what testimony, if any, was offered before the Commission to support its finding, nor whether or not the rates were in fact confiscatory. It is therefore suggested that, in so far as the record discloses, the shipper had open to it defenses, (a) lack of testimony to support the finding and order of the Commission; (b) the fact and amount of damage, and (c) the question of confiscation.

The rule of law in Missouri as to what constitutes voluntary payment has heretofore been discussed under the question of jurisdiction. Under those authorities the payment by petitioners was a voluntary payment.

The court below did not hold that, had respondent instituted suit to collect the award of damages in question, the carrier could have tried out the reasonableness of the rates assailed, but held that where rates found by a regulatory body to be compensatory were attacked as being

confiscatory, courts may inquire into the method by which its conclusions were reached (R. 107).

Some of the facts in the record relative to the circumstances under which the payment was made by the carrier to the respondent appear from the testimony of B. V. Forrester, one of respondent's witnesses. His testimony is as follows (R. 88):

> "Q. Wish you would state just what you said to Mr. Perkins and what Mr. Perkins said to you relative to the payment of reparation, as far as you can recall.
>
> A. I asked Mr. Perkins about the payment of the reparation. At the time the order was near at hand, and Mr. Perkins said that Mr. Larimore had been handling the reparation in this particular case and he wasn't very familiar with it, and then Mr. Perkins asked me what the Frisco had done about it and I told him that Mr. Kurn had agreed, or rather had ordered, the reparation paid, and he said, 'Well, whatever the Frisco had done, the Missouri Pacific will do likewise.'
>
> Q. Who was Mr. Kurn?
>
> A. President of the Frisco Lines.
>
> Q. Now, did you have any further conference with anyone connected with the Missouri Pacific after that time relative to the payment of reparation as ordered?
>
> A. No, other than I assisted the auditing department in handling Form 5 statement."

In view of the foregoing testimony it would appear that the lower court was justified in concluding and stating in its opinion that the carrier did voluntarily pay the award, without hint or suggestion to respondent that the matter would be further litigated, and the record clearly shows that the award was paid before motion for rehearing was filed (R. 26).

When Mr. Perkins, the vice-president of the carrier company, stated that his company's action would be gov-

erned by what a competitive line did, it seems clear that the payments made were not involuntary, as the result of coercion or duress, but, rather, a voluntary act.

II.

The Supreme Court of Missouri Held, in Construing Said Section 16 of the Act, That the Carrier Should Have Refused to Pay the Award Entered by the Commission and Awaited a Suit by the Shipper, in Which Suit It could Have Invoked Every Defense Which the Law Afforded It, and That the Payment of the Award Before Filing Motion for Rehearing Before the Commission and Without Suit Having Been Brought, Was a Voluntary Payment and Could Not Be Recovered, Although Such Orders by the Commission Had Thereafter Been Set Aside by the Body.

The above statement is the second reason relied on for the allowance of the writ, as set out in petitioners' petition filed herein.

The same has not been restated for the reason that it is a correct statement of the holding of the lower court, but apparently is a repetition in slightly different language of the proposition stated in reason number I assigned in petitioners' petition, and therefore what we have said with respect to question number 1 in paragraph number 1 of this argument is equally applicable here and will not be repeated.

III.

The Supreme Court of Missouri Also Held That Payment of the Award in Question Without Waiting for Suit to Be Brought Thereon Was Not a Payment Under a Mistake of Fact, but Was a Payment Voluntarily Made, With Full Knowledge of All the Facts, and Could Not Be Recovered by Petitioners, Although the Award in Question Had Been Set Aside by the Commission.

The above is the third reason assigned in the petition of petitioners for the allowance of the writ, but it is discussed in petitioners' brief under [illegible] of their argument. Respondent does not contend that the reasonableness or unreasonableness of a rate charged by a railroad company is not a question of fact, and the Court did not so hold. The court below did not hold that the reasonableness or unreasonableness of a rate charged was not a question of fact, but did hold:

> "A mistaken belief of the parties that the finding of the Commission was either right or wrong would not be a mutual mistake of fact."

In the trial court petitioners did not seek to recover on the ground of mutual mistake of fact, but, rather, based their cause of action on the proposition that the Interstate Commerce Commission had legal authority to make reparation awards and to enforce the same and alleged that the railroad company had no appeal, and, having no alternative, was required to and did pay to the defendant (R. 9). In the trial court the petitioners did not raise the question of the payment being made under mutual mistake of fact, as appears from the declarations of law tendered (R. 90, 91, 92, 93 and 94), and their motion for new trial (R. 97, 98 and 99). The question as to whether or not there was a mutual mistake of fact, not having been

raised, was not essential to a decision of the case nor determinative of it, and, in addition thereto, the determination as to whether or not the payment was made under a mutual mistake of fact would appear to be a matter of general law and not in any sense a federal question to be determined by a construction or interpretation of any federal statute.

IV.

The Supreme Court of Missouri Held That Since, in Its Opinion, the Payment of the Award in Question Was Voluntary, Such Payment Caused Respondent to Believe That the Matter Was a Closed Transaction and That It Would Be Inequitable to Require Respondent to Refund the Amount So Paid, Even Though the Commission Had Set Aside the Award of Reparation and All Orders Requiring the Payment Thereof, Because the Respondent Could Not Be Placed in Statu Quo.

Under this heading respondent will discuss the fourth reason set out in petitioners' petition for the allowance of the writ, which seems to be treated under points III and IV of petitioners' argument.

An analysis of the opinion of the lower court would apparently lead to the conclusion that the Court's decision was primarily based on the proposition that the circumstances surrounding the payments were such as to estop the petitioners from recovering because their conduct had been such as to cause the respondent to believe that the transaction was closed, and that the respondent had changed its position so that it could not be placed in statu quo, and that it would be inequitable and unjust to require restitution. An action for restitution is an action for money had and received and to which equitable defenses may be interposed. The holding of the Supreme

Court of Missouri that petitioners could not recover because of respondent's changed condition due to the action and conduct of petitioners, and that it would be inequitable and unjust to require a restitution, is in harmony with the decisions of the courts of last resort in that state. On this question the lower court said (R. 109):

> "In an action for money had and received the plaintiff is entitled to recover if, under the facts shown, it would be contrary to equity and good conscience for the defendant to retain the money. The converse of the rule is also true. In such an action the plaintiff cannot recover if it appears from the facts that it would be inequitable and unjust to compel defendant to return the money. Teasdale v. Stoller, 133 Mo. 645, 34 S. W. 873; Bull v. United States, 295 U. S. 247; Atlantic Coast Line Railroad Company v. Florida, 79 L. Ed. 1451; 41 C. J., p. 51, Sec. 39."

The decision of the lower court appears to be in harmony with the decisions of this Court. In the case of Atlantic Coast Line Railroad Company v. Florida, 295 U. S. 301, 55 S. Ct. 713, 79 L. Ed. 1451, the Court said:

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. (Cases cited.) The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. (Cases cited.) The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. (Cases cited.)"

It is the view of the respondent that whether it would be equitable for respondent to retain the money does not depend in this case upon the construction of any section

of the Commerce Act, but depends upon the facts and circumstances under which the payment is made, and those facts and circumstances were found by the lower court to be such as to make it inequitable and unjust to require restitution by the respondent.

CONCLUSION.

It is therefore respectfully submitted that this cause is not one within the jurisdiction of this Court, for the reason that the decision of the lower court rested, at least in part, on matters of general law sufficiently broad to sustain its judgment, and it is further submitted that the decision of the lower court, in so far as it construes Section 16 of the Commerce Act, construed the same in harmony with the decisions of this Court, and that petitioners' petition and brief present no peculiar reasons or circumstances which would necessitate or cause this Court to grant its writ herein, and the same should be denied.

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FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

L. W. BALDWIN and GUY A. THOMPSON, as Trustees of the MISSOURI PACIFIC RAILROAD COMPANY,
Petitioners,
v.
SCOTT COUNTY MILLING COMPANY.
No. 650.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S SUPPLEMENTAL BRIEF.

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On Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S SUPPLEMENTAL BRIEF.

JURISDICTION.

In respondent's original brief filed in opposition to the application for writ of certiorari the question of the jurisdiction of this Court was discussed on pages 5, 6, 7, 8 and 9, and the position taken by respondent is that this Court is without jurisdiction for the reason that the judgment of the state court was based, in part, on nonfederal questions broad enough to maintain the judgment.

In petitioners' supplemental brief petitioners seem to rely on the case of Union Pacific Railroad Company v. Public Service Commission of Missouri, 248 U. S. 67, 63 L. Ed. 131, to refute respondent's contention. In the Union Pacific case the Supreme Court of Missouri held that, notwithstanding the charge made by the Public Service Commission of Missouri for certificate authorizing the issuance of bonds secured by a mortgage on the whole line of the Union Pacific Railroad was unreasonable, that the railroad company was estopped to decline to pay the statutory compensation because it had voluntarily made an application to the Commission for such certificate, and from that it was argued that the decision on the ground of estoppel excluded the jurisdiction of this Court; but this Court held that it was the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence where the facts are in dispute, for finding that a federal right had been waived. This Court held that the charge of the Missouri Commission of $10,962.25 for certificate authorizing the issuance of bonds where all but six-tenths of a mile of its main track were outside of Missouri was an unlawful interference with commerce among the states. The railroad company accepted the grant as required by its terms, but protested in writing against the charge as an unconstitutional interference with interstate commerce and gave notice that it paid under duress to escape the statutory penalties and to prevent the revocation of the certificate.

The facts in the Union Pacific case make it easily distinguishable from the facts in the case now before this Court. The statutes of Missouri prohibited the issuance of bonds by the railroad company without authority of the Commission, imposed severe penalties for such issue and purported to invalidate the bonds if issued without such certificate. Under such circumstances the railroad company paid the prescribed fee, but protested in writing

at the time that they were making the payment under duress and to escape the statutory penalties and to prevent the revocation of the certificate. In the instant case the payments made by the petitioners to the respondent were made betwen April 4 and April 19, 1929 (R. 26), while the order of the Commission fixed the time for payment on or before April 26, 1929 (R. 25), and were made before petitioners had filed their first motion for rehearing before the Interstate Commerce Commission, the first motion for rehearing having been filed April 25, 1929 (R. 103). At the time the petitioners made the payments in question the Interstate Commerce Commission had made its finding that respondent was entitled to damages by way of reparation, but no suit had been brought and the Interstate Commerce Commission had no power to enforce its award, and no penalty could be inflicted by the Commission for failure to make payment of damages, and the only recourse the respondent had was to bring suit for damages within one year, and in such suit, if brought in the federal court, the finding of the Commission would be receivable as prima facie evidence.

When the petitioners paid the award it was not paid under protest; it was paid before it was due under the order of the Commission and was ordered to be paid by the vice-president of the railroad company, not because of coercion but because the Frisco Railroad Company had already ordered reparation paid (R. 88).

The Supreme Court of Missouri, in its opinion, held that under the facts in the instant case it would be "against equity and good conscience and a rank injustice" to require the respondent to repay the amount of the award to the carrier. Granting that it is the province and duty of this Court to examine the facts to determine whether or not there is any basis for the decision of the state court, it is respondent's view that the facts in the record amply

support the findings of the lower court on this question. The agreed statement of facts and the depositions offered at the trial of the case in the state court show that the respondent was under contract to pay its representative 50 per cent of the amount of the award, and that when the payments were made to it prior to the final date for payment as fixed by the order of the Commission and before the filing of a motion for rehearing the respondent paid its representative 50 per cent of the amount it received, and that although the final order of the Interstate Commerce Commission attempting to set aside all of its previous orders was entered on July 3, 1933 (R. 31), no demand was made upon respondent for return of the money until the 30th day of October, 1934 (R. 27). If the petitioners had demanded the return of the money at the time of the final order of the Commission July 3, 1933, the respondent's claim against its representative for return of the fee paid for his services would not have been barred by the Missouri Five-Year Statute of Limitations (Sec. 862, Revised Statutes of Missouri 1929, Appendix, p. 19), but the petitioners made no demand until November, 1934, which was more than five years after the respondent had paid its representative, and therefore its claim for reimbursement was barred by the Missouri Five-Year Statute of Limitations. The record in the case likewise discloses that there was no reason for the respondent to assume that the petitioners would seek to recover the amount paid it, because in one of the numerous petitions filed for rehearing before the Interstate Commerce Commission, to wit, the petition filed July 10, 1931 (R. 27), the petitioners alleged:

> "The Scott County Milling case, supra, involves future rates and reparation. The reparation has been paid, the rates prescribed made effective and the case is asked to be reopened for the purpose of having the Commission prescribe for the future a different and higher basis of rates."

It is conceded by respondent that the construction of Section 16, Chapter I, of the Interstate Commerce Act, found in Title 49, United States Code Annotated, is a federal question, and it is further conceded that if the state court construed this section in any manner that conflicts with the views of this Court as to the proper construction, the state court's construction cannot stand; but we have been unable to find anything in the decision of the Missouri Supreme Court that conflicts with what this Court has said as to the construction of said section.

In respondent's original brief reference was made to the case of Meeker v. Lehigh Valley Railroad Company, 236 U. S. 412, as to the construction of said Section 16 of the Commerce Act.

Another decision by this Court construing the same section is Lewis-Simas-Jones Company v. Southern Pacific, 283 U. S. 654, wherein the Court said:

> "This act does not create a cause of action based on the Commission's findings and reparation order for the recovery of money collected as freight charges based on rates alleged to be unjust and unreasonable. It makes a determination by the Commission of the unreasonableness of the rate attacked and the extent that it is, if at all, excessive a condition precedent to suit.
>
> "Section 16 (2) provides that, if the carrier shall not comply with an order for the payment of money within the time specified, the person for whose benefit it was made may file in the District Court of the United States 'or in any state court of general jurisdiction' a petition setting forth briefly 'the causes for which he claims damages and the order of the Commission,' and that the suit in the United States court shall proceed in all respects 'like other civil suits for damages,' except that the findings and order of the Commission shall be prima facie evidence of the facts therein

stated. The section contains nothing relating to evidence or procedure in state courts. It is clear that the action is not on the award as such."

The state court, in construing the said section 16, said (R. 107):

"The reparation award made by the Commission is not a judgment and the Commission could not have enforced its payment. The Interstate Commerce Act provides that if a carrier does not pay the award within the time fixed in the Commission's order, the shipper may bring a suit against the carrier in a court of competent jurisdiction to recover damages because of the unreasonable charges exacted, and in such suit the order of the Commission shall be prima facie evidence of the facts stated in such order.

"The carrier could have refused to pay the award made by the Commission and awaited a suit by the shipper, in which suit it could have invoked every defense which the law afforded it. It did not take that course, but on the contrary paid the award in full before filing its motion for rehearing with the Commission."

It is respectfully submitted that the construction of said section 16 by the state court is in harmony with the construction given that section by this Court.

The state court held that under the facts in this case the payment was a voluntary payment, and such decision is in harmony with the rule in Missouri with respect to voluntary payment, the authorities on this question being cited in respondent's original brief, pages 6 and 7.

It is respondent's view that the question as to whether or not the payments made by the carrier to the respondent were voluntary or involuntary does not in anywise depend upon the construction of said Section 16 of the Commerce Act; rather, the question as to whether they were volun-

tary or involuntary depends upon the facts regarding the payments and the circumstances under which the payments were made, and whether under such existing facts and circumstances such payments were voluntary or involuntary are matters of general law to be determined by the law of the forum and are not in any sense federal questions.

The state court decision rested not alone on the question of the payments being voluntary, but the decision rested on the further question as to whether or not under the circumstances as shown by the record in this case it would be inequitable to require the respondent to repay the money it had received. It is again submitted that whether or not equity and good conscience would require the restoration of the money is a matter of general law, and not in any sense a federal question nor dependent at all upon the construction of any section of the Commerce Act; rather, it depends upon the relation of the parties, the circumstances as shown by the record and whether or not the equities require the restoration of the fund.

The holding of the state court that in an action for money had and received the plaintiff cannot recover if it appears from the facts that it would be inequitable and unjust to compel the defendant to return the money is in harmony with the decision of this Court in the case of Atlantic Coastline Railroad Company v. Florida, 295 U. S. 301, 79 L. Ed. 1451. It appears to be a rule of decision in this court, however, that if the record discloses that there were completely adequate grounds for the state court's decision on a nonfederal question, this Court will not inquire as to whether the decision upon such question was correct or incorrect. In Leathe v. Thomas, 207 U. S. 93, 52 L. Ed. 118, the Court said:

> "It is admitted that the general and well-settled rule is that in a case coming from a state court this

court can consider only federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions. Murdock v. Memphis, 20 Wall. 590, 22 L. Ed. 429; Sauer v. New York, 206 U. S. 536, 546, 51 L. Ed. 1176, 1181, 27 Sup. Ct. Rep. 686. It is admitted further, that a decision upon those questions must have been necessary to the decision of the case, so that, if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed, as the case may be. Murdock v. Memphis, supra. But Murdock v. Memphis does not stop there. It further establishes that when the record discloses such other and completely adequate grounds this court commonly does not inquire whether the decision upon them was or was not correct, or reach a federal question by determining that they ought not to have been held to warrant the result. 20 Wall. 590, 635, 22 L. ed. 429, 444; Eustis v. Bolles, 150 U. S. 361, 369, 37 L. ed. 1111, 1113, 14 Sup. Ct. Rep. 131; Castillo v. McConnico, 168 U. S. 674, 679, 42 L. ed. 622, 624, 18 Sup. Ct. Rep. 229."

In the early case of Murdock v. The Mayor and Aldermen of Memphis, 20 Wall. 590, 22 L. Ed. 429, the Court said:

"1. That it is essential to the jurisdiction of this Court over the judgment of a State Court that it shall appear that one of the questions mentioned in the Act must have been raised, and presented to the State Court.

"2. That it must have been decided by the State Court, or that its decision was necessary to the judgment or decree, rendered in the case.

"3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws or authority of the United States.

"4. These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State Court.

"5. If it finds that it was rightly decided, the judgment must be affirmed.

"6. If it was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue."

In Hale v. Lewis, 181 U. S. 473, 45 L. Ed. 959, the Court held that a decision of the state court that a corporation was estopped to set up the invalidity of a statute, even if it was unconstitutional, could not be reviewed by the Supreme Court of the United States, since the estoppel was a nonfederal ground broad enough to support the judgment.

In Garr, Scott and Company v. Shannon, 223 U. S. 468, 56 L. Ed. 510, this Court held that where the question as to a voluntary payment fairly arose out of the record and was not arbitrarily injected into the case, this Court was without jurisdiction. In this opinion the Court said:

"What we have said shows that the question as to voluntary payment fairly arose out of the record and was not arbitrarily injected into the case. Leathe v. Thomas, 207 U. S. 99, 52 L. Ed. 120, 28 Sup. Ct. 130. A decision on that nonfederal point could properly dispose of the plaintiff's suit to recover back what it had paid."

We believe that the record in this case shows com-

pletely that the questions of voluntary payment and estoppel fairly arose out of the record and were not arbitrarily injected into the case. In respondent's answer in the state trial court defendant alleged (R. 13) that the Interstate Commerce Commission had no power or authority to issue execution or process for the purpose of enforcing its order, and that the railroad company could either voluntarily acquiesce in the order or refuse to make payment, and that, if they refused to make payment, the only recourse was a suit for damages, and alleged that after the order the railroad company, with knowledge of the facts and without fraud or duress, voluntarily elected to pay the reparation, and that the same could not be recovered back.

The answer further alleged (R. 14) that the respondent had employed a traffic expert to represent it before the Commission and agreed to pay him a contingent fee of 50 per cent, and that when the railroad company paid the reparation respondent believed the matter had been concluded and finally terminated and paid its representative 50 per cent of the amount received, and that no demand for repayment was made for more than five years, so that respondent's right to recover against its traffic expert was barred by the Missouri Statute of Limitations, and that respondent had distributed the balance of the fund by way of dividends to its stockholders and used it for corporate purposes, and that the railroad company and its trustees had stood by for six years without making a claim or demand, and that when it filed one of its motions for rehearing it alleged that the reparation had been paid and that the railroad company was asking the case to be reopened for the purpose of having the Commission prescribe for the future a different and higher basis of rate.

The answer further alleged (R. 15) that after the Interstate Commerce Commission had set aside its order reduc-

ing the rates on coal from Southern Illinois to Southeast Missouri points from $2.13 a ton to $1.63 a ton the railroad company and connecting lines voluntarily filed a rate of $1.75, thereby admitting and confessing that the previous rate of $2.13 a ton was unreasonable, and alleging that the Missouri Pacific Railroad Company and its trustees had been reimbursed by connecting carriers for a large portion of the money they seek to recover in this action, and that the railroad company never at any time filed before the Interstate Commerce Commission any petition making any claim or contention that the respondent should return the reparation paid.

The answer further alleged (R. 16) that if the railroad company had not elected to pay a reparation the respondent would have had a cause of action for damages if instituted within one year, and that the payment of the reparation by the railroad company prevented the respondent from instituting such action and prevented the respondent from having its rights litigated in the courts, and that the railroad company was now estopped from claiming the reparation was wrongfully paid.

The answer further alleged (R. 17) that under the rules of the Commission a petition for rehearing should be filed within sixty days and that under the rules of the Commission a second application for rehearing, reargument, reconsideration or vacation of any order, by the same party or parties, and upon the same ground, which has been considered and denied, would not be entertained, and that the petition for reopening and reargument which was filed June 3, 1931, was not filed within sixty days after the service of the report of order for the reparation and was filed by the same parties and on the same grounds as former petitions had been filed, which had been overruled, and that by virtue of the rules adopted by the Commission it had no power or authority to entertain such petition for rehearing and that the order of the Commission

had become final long prior to the filing of petition for rehearing on June 3, 1931, and that under the rules of the Commission it was without power or authority to enter an order with retroactive effect so as to affect the private rights of the respondent.

The agreed statement of facts (R. 22-31) and the depositions offered (R. 87-91) support the allegations of the answer in so far as questions of fact were raised by the answer.

In this situation it is the view of the respondent that the question of voluntary payment and the question of estoppel arose out of the record, and, in fact, was in the case from its inception in the state trial court, and that such questions were not arbitrarily injected into the case by the Supreme Court of Missouri for the purpose of trying to avoid the jurisdiction of this Court, but were live, vital questions, raised at the inception of the case in the state court, and were issues properly raised and properly in the record to be considered and determined by the Missouri Supreme Court.

PAYMENT OF THE AMOUNT SUED FOR WAS VOLUNTARY.

In petitioners' supplemental brief reference is again made, on the question of whether or not the payments were voluntary, to the case of Union Pacific Railroad Company v. Public Service Commission of Missouri, 248 U. S. 67. The quotation from the opinion set out on page 4 of petitioners' supplemental brief distinguishes that case from the instant case. The opinion says:

> "The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The Rail-

road Company and its officials were not bound to take the risk of these threats being verified."

The petitioners were not confronted with any such trying situation when they made the payments to respondent. Neither their franchises nor their property was in jeopardy. The only penalty for failure to pay was the possibility of an attorney fee being taxed as costs in the event the shipper prevailed in the suit for damages if such suit was brought within a year, as provided by the Commerce Act.

In many states delinquent taxes are collected by suit, and the trial court is authorized to tax as costs a reasonable attorney fee for the tax attorney. In so far as we have been able to ascertain, it has never been held that the fact that an attorney fee might be taxed as costs would of itself make the payment before suit was brought an involuntary payment or one made under duress.

In Union Pacific Railroad Company v. Board of County Commissioners, 98 U. S. 541, 25 L. Ed. 196, this Court passed upon a case where the Union Pacific Railroad Company brought suit to recover taxes paid on lands in Dodge County, Nebraska, granted by Congress to the company to aid in the construction of the railroad. The lands were placed on the assessment list of the county, and general and local taxes levied for the respective years were carried out against the lands and the railroad company designated as owner. In due time tax warrants were delivered to the treasurer for collection. The warrants authorized the treasurer, in default of payment, to seize and sell the personal property of the persons making default. No demand for the payment of taxes was necessary under the law, and the railroad company had personal property in the county that might have been seized. Without any demand for the payment of the taxes the railroad company

made the payment and delivered to the treasurer a notice in writing that it protested against the taxes paid, for the reason that they were illegal and unauthorized by law, and that suit would be instituted to recover back the money paid. Thereafter, in a decision of this Court, which was supposed to decide that the particular land in question was not subject to taxation, suit was brought to recover the taxes, and this Court said:

> "Under such circumstances we cannot hold that the payment was compulsory in such a sense as to give a right to the present action. As the answer to this question disposes of the case, it is unnecessary to consider the other question certified, and that judgment is affirmed."

It is our view that the decision of the state court that the payment was voluntarily made by the petitioners to the respondent is amply supported by the above-quoted case. In the Union Pacific case the treasurer had the tax warrant in his hands which authorized a levy without first making demand, and when the tax was paid written protest was filed, but in the instant case not only was there complete lack of authority to levy on property or to work a forfeiture in any sense, but, in addition, the payments were made without protest, and the petitioners would have their day in court if the respondent brought suit for damages following the award made by the Commission.

In Garr, Scott and Company v. Shannon, 223 U. S. 468, 56 L. Ed. 510, the Court said:

> "Neither a statute imposing a tax nor the execution thereunder, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be duress of goods, or if there is, the citizen, to avoid the consequence of the duress, may pay the money, regain the use of his property and maintain a

suit for the recovery of what has been exacted from him."

In petitioners' supplemental brief, on page 5, it is urged that the respondent elected to demand and receive the payment from the petitioners before the expiration of the time given petitioners to file a motion for rehearing, with no assurance, express or implied, that a motion for rehearing would not be filed with the Commission. It appears clearly from the testimony (R. 88) that when the vice-president of petitioners advised respondent's representative that they would pay the reparation because the Frisco Railroad had ordered reparation paid, there was no intimation that the matter would be litigated further or that a motion for rehearing would be filed, and it thus appears that the respondent was justified in treating the matter as a closed transaction. If petitioners had intended to litigate the matter further they could have done one of many things to advise the respondent that they intended so to do. They could have waited until after suit was brought; they could have at least paid under protest; they could have at least waited until after they had filed a motion for rehearing; but without doing either, they paid before the due date as fixed by the Commission, without coercion and under circumstances that the state court held the payment to be voluntary.

THE PURPOSE OF THE INTERSTATE COMMERCE ACT DOES NOT MAKE NECESSARY RECOVERY BY PETITIONERS.

The point is made in petitioners' original brief, and again in supplemental brief, page 5, that a holding that petitioners are entitled to recover in this case would be in accord with the purpose of the Interstate Commerce Act,

and cases are cited holding that the purpose of Congress in passing the Interstate Commerce Act was to cut up by the roots every form of discrimination, favoritism and inequality, and the argument is made that to permit this respondent to retain the payment in face of the fact that the carrier could not be required to pay other shippers similarly situated would open the door to discrimination and preference. We think that the fact that one shipper pursued his remedy and another did not does not amount to the discrimination, favoritism and inequality sought to be eradicated by the Interstate Commerce Act. When the Commission orders reparation a shipper is limited to one year in which to bring an action. If one shipper brings suit within a year and another shipper does not, it results in an inequality. If the carrier fails to collect the full charges for shipments and as to one shipper suit is brought within the time prescribed by the statute, the carrier lawfully collects the amount due. If, however, as to another shipper suit is not brought within the statutory period of time, the cause of action is barred and the additional freight charge is never paid. Every shipper who is affected by the order of the Interstate Commerce Commission with respect to the payment of reparation had the same right to bring suit against the carrier for damages in the event payment was not made, as did the respondent, and the fact that some other shipper was not or may not have been paid and, not having been paid, failed to exercise the right given by statute to sue within one year and lost such right, does not amount to a discrimination or favoritism such as the Interstate Commerce Act sought to wipe out.

CONCLUSION.

In conclusion, it is submitted that under the facts shown by the record in this case the payments were made without duress and were voluntary, and that in the state court the

respondent raised the questions of voluntary payment and estoppel and that on both of those questions the Supreme Court of Missouri passed on the issues thus raised, and that they were live, substantial questions in the case, and that such questions were not in any sense federal questions, and in addition it is respectfully submitted that the decision of the state court that the payments were voluntary is not in conflict with the decisions of this Court as to what constitutes duress or voluntary payment, and it is further submitted that in so far as the state court attempted to construe Section 16 of the Commerce Act, their construction is in harmony with the construction of this Court.

Respectfully submitted,

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APPENDIX.

Applicable statutes of limitations of Missouri to suits for money had and received are as follows:

"Sec. 861. **What actions shall be commenced within ten years.**—Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief, not herein otherwise provided for (R. S. 1919, Sec. 1316)."

"Sec. 862. **What within five years.** Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 861, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud (R. S. 1919, Sec. 1317)."

Section 16, Chapter 1, of the Interstate Commerce Act, found in Title 49, U. S. C. A., page 6, is as follows:

"(1) **Orders by commission for payment of dam-**

ages. If, after hearing on a complaint made as provided in section 13 of this chapter, the complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"(2) **Proceedings in courts to enforce orders; costs; attorney's fee.** If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court or general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

"(3) **Limitation of actions.** (a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after

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"(f) A petition for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the state court within one year from the date of the order, and not after."

SUPREME COURT OF THE UNITED STATES.

No. 650.—October Term, 1938.

L. W. Baldwin and Guy A. Thompson, as Trustees of Missouri Pacific Railroad Company, Petitioners, *vs.* Scott County Milling Company. } On Writ of Certiorari to the Supreme Court of the State of Missouri.

[June 5, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

The decision in this case depends on provisions of the Interstate Commerce Act and orders of the commission.

In September, 1924, respondent and others complained to the commission that the tariff charges they had been and were then paying the Missouri Pacific and other carriers for the transportation of coal from mines in southern Illinois and western Kentucky to destinations in southeastern Missouri and northeastern Arkansas, were excessive. They asked the commission to establish reasonable rates for the future, to ascertain the amount of damages they had sustained, and to order the carriers to make reparation. After hearings the commission, by order of February 11, 1929, and supplemental order of March 11 in the same year, found that the carriers' tariff rates had been, were, and for the future would be, unreasonable to an extent indicated, prescribed as reasonable lower rates to be established for the future, and found that complainants including respondent, having paid excessive charges, had suffered damages and were entitled to reparation to the extent of the difference between amounts paid and what the charges would have been under the rates that the commission then found reasonable.

On demand of the respondent, made in accordance with the commission's rules of practice,[1] the Missouri Pacific before April 20, 1929, paid it $23,994.33, being the amounts directed to be paid by the reparation order on account of shipments for which the Missouri Pacific, delivering carrier, had collected the charges. After denial of a number of petitions for rehearing filed by the Missouri Pacific and other carriers, the commission, November 2, 1931, reopened

[1] The applicable rule is V: Reparation Statements — Formal Claims for Reparation Based Upon Findings of the Commission. See Rules of Practice Before the Commission, revised to April 1, 1936.

the case. July 3, 1933, after hearings and protracted contest, it found the rates that it had theretofore condemned were not unreasonable and set aside all findings and orders that it had made, including the reparation order on which respondent had collected.

October 30, 1934, petitioners, who had been appointed trustees of the Missouri Pacific, asked respondent to refund the amount it had received; respondent refused. To recover with interest the amount the Missouri Pacific paid, petitioners brought this suit in a circuit court of Missouri; it gave judgment for respondent. The supreme court affirmed. It held that, as the Missouri Pacific had paid the amount of the reparation award with full knowledge of the facts without denying liability or waiting to be sued, the payment was a voluntary one and that therefore petitioners were not entitled to recover. The court also held that by the voluntary payment the Missouri Pacific caused respondent to believe that the matter was a closed transaction and that in the circumstances, to which reference will later be made, it would be inequitable to require respondent to refund.

We think that petitioners are entitled to recover.

1. In absence of prior finding by the commission that the tariff charges collected for interstate transportation are unreasonable, there can be no enforceable claim for damages caused by exactions according to the tariff. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 444. *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506, 510. *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247, 259. And see *Lewis, etc. Co.* v. *Penna. R. R. Co.*, 283 U. S. 654, 661; *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448, 458. Prior to the findings and orders of the commission, February 11 and March 11, 1929, respondent was not permitted to collect, nor was the Missouri Pacific or other carriers allowed to pay, the damages claimed by respondent. But when the commission made the findings and reparation orders, the carriers, in the absence of facts constituting a defense, were in duty bound to pay in accordance with the order.

Section 16(1)[2] provides that if the commission shall determine complainant entitled to an award of damages, it shall direct the car-

[2] "If, after hearing on a complaint made as provided in section 13 of this chapter, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." 49 U. S. C. § 16(1).

rier to pay complainant the sum to which he is found entitled within a specified time. Section 16(2)[3] declares that if the carrier does not comply within the time limit, complainant may bring suit setting forth the causes for which he claims damages. It also declares that, in claimants' suits in federal courts, the findings and order of the commission shall be prima facie evidence of the facts therein stated. It allows plaintiffs, if they prevail, to recover reasonable attorneys' fees. By thus laying on the carriers the burden of bringing forward evidence to overcome presumptions created against them, and by compelling them, if defeated, to pay plaintiffs' attorneys' fees in addition to the interest allowed by law, the Act unmistakably evidences purpose directly to prevent interposition of pleas lacking merit and so coercively to bring about prompt payment of the commission's awards. In *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412, this Court, upholding the clause as to attorneys' fees, said (p. 433): "The provision is leveled against common carriers engaged in interstate commerce, a *quasi* public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the Act to Regulate Commerce. . . . One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands does not militate against its validity. And in *St. L. & S. F. R. R.* v. *Spiller*, 275 U. S. 156, referring to the same provision, we said (p. 159): "The purpose of Congress in making the provision concerning costs was to discourage harassing resistance by a carrier to a reparation order."

There is nothing in the record to indicate, nor is it suggested by respondent or in the state court's opinion, that the Missouri Pacific

[3] "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." 49 U. S. C. § 16(2).

had any defense against respondent's claim under the findings and reparation order. The liability so established persisted until payment of the claim. It may not reasonably be held that the Missouri Pacific was bound to await suit or delay adjudication by false or frivolous answer while expenses of litigation, interest, and fees for its adversary's counsel accumulated. Sections 16(1) and 16(2) indicate legislative purpose to penalize failure of carriers, having no defense, to pay damages in accordance with the terms of the commission's findings and reparation orders.

But by § 16a,[4] the commission was empowered to set aside its orders. That section was drafted by the commission at the request of the Senate Committee on Interstate Commerce and was added by the Hepburn Act of 1906. It was "a new section . . . . which expressly authorizes the commission to review and modify its own decisions."[5] It was expounded by the commission as "intended to give the commission a right to rehear a matter for the purpose of correcting any injustice in a previous order." *Cattle Raisers' Asso. of Texas* v. *M. K. & T. Ry. Co.*, 12 I. C. C. 1, 3. While careful to prevent applications for rehearing from being used to avoid or delay compliance with the commission's orders, it empowers the commission at any time to grant rehearings as to any decision, order, or requirement and to reverse, change, or modify the same. Respondent made its demand and collected the money subject to the authority of the commission to set aside the order which authorized payment of the same.

The clauses of § 16a that authorize the commission to consider facts arising after the former hearing and that make its decisions

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[4] "After a decision, order, or requirement has been made by the commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order." 49 U. S. C. § 16a.

[5] Nineteenth Annual Report of the Interstate Commerce Commission, p. 12.

after rehearing subject to the same provisions as an original order manifest the purpose of the Act to require carriers to serve for, and the shippers to pay, the lawful tariff rates. The Act condemns every deviation from lawful tariff rates. It declares that no carrier may lawfully collect a greater or less or different compensation for transportation than the rates specified in the tariff filed nor refund or remit any portion of the rates so specified. § 6(7); see also § 10(2). Similarly, it condemns the obtaining of transportation for less than the legally established rate. See § 10(3) and (4). Involuntary rebates as well as those that are voluntary are prohibited. *Lowden, et al.* v. *Simonds-Shields-Lonsdale Grain Co.*, — U. S. —. *Pittsburgh &c. Ry. Co.* v. *Fink*, 250 U. S. 577, 582. *N. Y. Cent. R. R.* v. *York & Whitney Co.*, 256 U. S. 406. By accepting delivery of the coal, respondent became bound to pay the tariff charges. As the commission has found them not unreasonable but lawful, respondent is without right to retain the amount it collected upon the claim that they were excessive.

The retention by respondent of money collected under the findings and order that the commission later set aside and vacated clearly would be repugnant to the policy and provisions of the Act.

2. The facts on which the state court held it would be inequitable to require respondent to refund may be briefly stated. Respondent employed an expert to represent it before the commission and promised to pay him one-half the amount recovered as reparation. Upon collection, it promptly paid as agreed. When petitioners asked refund, more than five years had elapsed and suit to recover back the fee was barred by the statute of limitations. Respondent used the other half to pay dividends and for other corporate purposes. As above indicated, the court held the payment to be voluntary and rested its ruling on that fact. But as shown above it was not voluntary; it was demanded by respondent and compelled by the Act, findings, and reparation order. Moreover, equitable considerations may not serve to justify failure of carrier to collect, or retention by shipper of, any part of lawful tariff charges. *Pittsburgh &c. Ry. Co.* v. *Fink, supra. N. Y. Cent. R. R.* v. *York & Whitney Co., supra.*

Reversed.